

No. 11922

United States
Court of Appeals
for the Ninth Circuit

CLEM J. CUSACK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division

FILED

JAN 14 1949

PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

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For Appellee:

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United States Attorney,
ERNEST A. TOLIN,
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HERSCHEL E. CHAMPLIN,
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600 U.S. Post Office and Court House
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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the
Southern District of California, Central
Division

No. 19898—(49 USC 311(a))

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLEM J. CUSACK,

Defendant.

INFORMATION

The United States Attorney charges: [2]

COUNT I.

That on, to wit, June 13, 1947, at Los Angeles, California, in the State and Southern District of California, Central Division, and within the jurisdiction of this Court, Clem J. Cusack, defendant, doing business as Lincoln Transfer & Storage Co., unlawfully did knowingly and wilfully for compensation sell and offer for sale transportation subject to the Interstate Commerce Act, to wit, transportation of property by motor vehicle in interstate commerce on public highways for compensation, and make contracts, agreements and arrangements to provide, procure, furnish and arrange for such transportation, and hold himself out as one who sells, provides, procures, contracts and arranges for such transportation, and make a contract, agreement and arrangement with one Mrs. J. H. Oliver, for compensation, to wit, \$45.00, to provide, procure, furnish and arrange for transportation of certain property, to wit, 2,000 pounds household

goods, by motor vehicle on public highways from said Los Angeles, California, to San Antonio, Texas, for compensation, then and there without holding a broker's license issued by the Interstate Commerce Commission authorizing him to engage in such transactions, all in violation of Title 49, Section 311(a), U. S. Code. [3]

COUNT II.

That on, to wit, February 26, 1947, at Los Angeles, California, in the State and Southern District of California, Central Division, and within the jurisdiction of this Court, Clem J. Cusack, defendant, doing business as Lincoln Transfer & Storage Co., unlawfully did knowingly and wilfully for compensation sell and offer for sale transportation subject to the Interstate Commerce Act, to wit, transportation of property by motor vehicle in interstate commerce on public highways for compensation, and make contracts, agreements and arrangements to provide, procure, furnish and arrange for such transportation, and hold himself out as one who sells, provides, procures, contracts and arranges for such transportation, and make a contract, agreement and arrangement, with one Mrs. Ellen M. Hepner, for compensation, to wit, \$80.00, to provide, procure, furnish and arrange for transportation of certain property, to wit, household goods, by motor vehicle on public highways from Pottsville, Pennsylvania, to Los Angeles, California, for compensation, then and there without holding a broker's license issued by the Interstate Com-

merce Commission authorizing him to engage in such transactions, all in violation of Title 49, Section 311(a), U. S. Code. [4]

COUNT III.

That on, to wit, September 4, 1946, at Los Angeles, California, in the State and Southern District of California, Central Division, and within the jurisdiction of this Court, Clem J. Cusack, defendant, doing business as Lincoln Transfer & Storage Co., unlawfully did knowingly and wilfully for compensation sell and offer for sale transportation subject to the Interstate Commerce Act, to wit, transportation of property by motor vehicle in interstate commerce on public highways for compensation, and make contracts, agreements and arrangements to provide, procure, furnish and arrange for such transportation, and hold himself out as one who sells, provides, procures, contracts and arranges for such transportation, and make a contract, agreement and arrangement, with one Louis Nault, for compensation, to wit, \$60.25, to provide, procure, furnish and arrange for transportation of certain property, to wit, household goods, by motor vehicle on public highways, from Fremont, Nebraska, to Long Beach, California, for compensation, then and there without holding a broker's license issued by the Interstate Commerce Commission authorizing him to engage in such transactions, all in violation of Title 49, Section 311(a), U. S. Code.

COUNT IV.

That on, to wit, March 10, 1947, at Los Angeles, California, in the State and Southern District of California, Central Division, and within the jurisdiction of this Court, Clem J. Cusack, defendant, doing business as Lincoln Transfer & Storage Co., unlawfully did knowingly and wilfully for compensation sell and offer for sale transportation subject to the Interstate Commerce Act, to wit, transportation of property by motor vehicle in interstate commerce on public highways for compensation, and make contracts, agreements and arrangements to provide, procure, furnish and arrange for such transportation, and hold himself out as one who sells, provides, procures, contracts and arranges for such transportation, and make a contract, agreement and arrangement, with one Marvin Young, for compensation, to wit, \$50., to provide, procure, furnish and arrange for transportation of certain property, to wit, household goods, by motor vehicle on public highways from Cedar Rapids, Iowa, to Gardena, California, for compensation, then and there without holding a broker's license issued by the Interstate Commerce Commission authorizing him to engage in such transactions, all in violation of Title 49, Section 311(a), U. S. Code. [6]

COUNT V.

That on, to wit, July 12, 1946, at Los Angeles, California, in the State and Southern District of California, Central Division, and within the jurisdiction of this Court, Clem J. Cusack, defendant,

doing business as Lincoln Transfer & Storage Co., unlawfully did knowingly and wilfully for compensation sell and offer for sale transportation subject to the Interstate Commerce Act, to wit, transportation of property by motor vehicle in interstate commerce on public highways for compensation, and make contracts, agreements and arrangements to provide, procure, furnish and arrange for such transportation, and hold himself out as one who sells, provides, procures, contracts and arranges for such transportation, and make a contract, agreement and arrangement, with one Wm. H. Koch, for compensation, to wit, \$85.00, to provide, procure, furnish and arrange for transportation of certain property, to wit, household goods, by motor vehicle on public highways from Covington, Kentucky, to Los Angeles, California, for compensation, then and there without holding a broker's license issued by the Interstate Commerce Commission authorizing him to engage in such transactions, all in violation of Title 49, Section 311(a), U. S. Code. [7]

COUNT VI.

That on, to wit, May 21, 1946, at Los Angeles, California, in the State and Southern District of California, Central Division, and within the jurisdiction of this Court, Clem J. Cusack, defendant, doing business as Lincoln Transfer & Storage Co., unlawfully did knowingly and wilfully for compensation sell and offer for sale transportation subject to the Interstate Commerce Act, to wit, transportation of property by motor vehicle in in-

terstate commerce on public highways for compensation, and make contracts, agreements and arrangements to provide, procure, furnish and arrange for such transportation, and hold himself out as one who sells, provides, procures, contracts and arranges for such transportation, and make a contract, agreement and arrangement, with one Ethel Holman, for compensation, to wit, \$45.00, to provide, procure, furnish and arrange for transportation of certain property, to wit, household goods, by motor vehicle on public highways from Chicago, Illinois, to Long Beach, California, for compensation, then and there without holding a broker's license issued by the Interstate Commerce Commission authorizing him to engage in such transactions, all in violation of Title 49, Section 311(a), U. S. Code. [8]

COUNT VII

That on, to wit, October 8, 1946, at Los Angeles, California, in the State and Southern District of California, Central Division, and within the jurisdiction of this Court, Clem J. Cusack, defendant, doing business as Lincoln Transfer & Storage Co., unlawfully and knowingly and wilfully for compensation sell and offer for sale transportation subject to the Interstate Commerce Act, to wit, transportation of property by motor vehicle in interstate commerce on public highways for compensation, and make contracts, agreements and arrangements to provide, procure, furnish and arrange for such transportation, and hold himself out as one who sells, provides, procures, contracts and arranges for

such transportation, and make a contract, agreement and arrangement, with one Mrs. Francis Dambach, for compensation, to wit, \$20.00, to provide, procure, furnish and arrange for transportation of certain property, to wit, household goods, by motor vehicle on public highways from Charleroi, Pennsylvania, to Los Angeles, California, for compensation, then and there without holding a broker's license issued by the Interstate Commerce Commission authorizing him to engage in such transactions, all in violation of Title 49, Section 311(a), U. S. Code. [9]

COUNT VIII.

That on, to wit, February 21, 1947, at Los Angeles, California, in the State and Southern District of California, Central Division, and within the jurisdiction of this Court, Clem J. Cusack, defendant, doing business as Lincoln Transfer & Storage Co., unlawfully did knowingly and wilfully for compensation sell and offer for sale transportation subject to the Interstate Commerce Act, to wit, transportation of property by motor vehicle in interstate commerce on public highways for compensation, and make contracts, agreements and arrangements to provide, procure, furnish and arrange for such transportation, and hold himself out as one who sells, provides, procures, contracts and arranges for such transportation, and make a contract, agreement and arrangement, with one Mrs. Edmond O'Neil, for compensation, to wit, \$50.00, to provide, procure, furnish and arrange for transportation of certain property, to wit, household

goods, by motor vehicle on public highways from Hibbing, Minnesota, to Long Beach, California, for compensation, then and there without holding a broker's license issued by the Interstate Commerce Commission authorizing him to engage in such transactions, all in violation of Title 49, Section 311(a), U. S. Code. [10]

COUNT IX.

That on, to wit, February 26, 1947, at Los Angeles, California, in the State and Southern District of California, Central Division, and within the jurisdiction of this Court, Clem J. Cusack, defendant, doing business as Lincoln Transfer & Storage Co., unlawfully did knowingly and wilfully for compensation sell and offer for sale transportation subject to the Interstate Commerce Act, to wit, transportation of property by motor vehicle in interstate commerce on public highways for compensation, and make contracts, agreements, and arrangements to provide, procure, furnish and arrange for such transportation, and hold himself out as one who sells, provides, procures, contracts and arranges for such transportation, and make a contract, agreement and arrangement, with one Marie Germann, for compensation, to wit, \$50.00, to provide, procure, furnish and arrange for transportation of certain property, to wit, household goods, by motor vehicle on public highways from said Long Beach, California, to Seattle, Washington, for compensation, then and there without holding a broker's license issued by the Interstate Commerce Commission authorizing him to engage in such transactions,

all in violation of Title 49, Section 311(a), U. S. Code. [11]

COUNT X.

That on, to wit, June 22, 1946, at Los Angeles, California, in the State and Southern District of California, Central Division, and within the jurisdiction of this Court, Clem J. Cusack, defendant, doing business as Lincoln Transfer & Storage Co., unlawfully did knowingly and wilfully for compensation sell and offer for sale transportation subject to the Interstate Commerce Act, to wit, transportation of property by motor vehicle in interstate commerce on public highways for compensation, and make contracts, agreements and arrangements to provide, procure, furnish and arrange for such transportation, and hold himself out as one who sells, provides, procures, contracts and arranges for such transportation, and make a contract, agreement and arrangement with one Paul Reese, for compensation, to wit, \$50.00, to provide, procure, furnish and arrange for transportation of certain property, to wit, household goods, by motor vehicle on public highways from said Long Beach, California, to Belgrade, Montana, for compensation, then and there without holding a broker's license issued by the Interstate Commerce Commission authorizing him to engage in such transactions, all in violation of Title 49, Section 311(a), U. S. Code.

JAMES M. CARTER,

United States Attorney.

/s/ RAY H. KINNISON,

Assistant U. S. Attorney.

At a stated term, to wit: The February Term, A.D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 15th day of March, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

For arraignment and plea; H. Champlin, Ass't U. S. Att'y, appearing as counsel for Gov't; defendant present on bond, his attorney Mel Rodney, Esq., is not present; defendant states his true name is as set forth in Information, which is read, and defendant pleads not guilty to all ten counts.

Court orders cause continued to March 16, 1948, 10 a.m., for setting. [13]

At a stated term, to wit: The February Term, A.D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 20th day of April, in the year of our Lord one thousand nine hundred and forty-eight.

Present: Honorable Leon R. Yankwich, District Judge.

[Title of Cause.]

For jury trial; H. E. Champlin, Ass't U. S. Att'y, appearing as counsel for Gov't; Stuard Wegener, Esq., appearing as counsel for defendant, who is present; Attorney Wegener moves to be admitted to practice for this case only and it is so ordered. Court orders that a jury be impaneled for this trial and the clerk draws names of twelve jurors who take places in jury box. Court examines said jurors and explains the nature of the charges and passes the jurors in the box for cause.

Kiyoshi Sugimoto is excused by plaintiff and clerk draws name of Chas. J. Clancy, who is examined and passed for cause. Both sides waive further challenges, and the jurors now in the box are accepted and sworn as the jury for this trial, viz.: The Jury:

Chas. J. Clancy, Lila L. Nunnally, Margaret H. Lambert, Allan C. Zweng, Pauline V. Farmer, Florence C. Babb, Earl Allman, Maud B. Rosenberger, Louis F. Valdes, Mabel S. Quarry, Floria Leeds, Jeannette H. Zell.

Court orders that the petit jurors present who were not impaneled for this trial are excused until notified.

Counsel waive further reading of the Information. Attorney Champlin makes opening statement and Attorney Wegener defers opening statement.

At 11 a.m. Court admonishes the jury and de-

declares a recess. At 11:35 a.m. court reconvenes herein and all being present as before, including the defendant and the jury, and counsel so stipulating.

Marvin Young is called, sworn, and testifies for Gov't. Gov't Ex. 1 is marked for Ident. and admitted in evidence. [14]

Ethel Holman is called, sworn, and testifies for Gov't. Gov't Ex. 2 is marked for ident. and admitted in evidence.

Frances Dambach is called, sworn, and testifies for Gov't. Gov't Ex. 3 is marked for ident. and admitted in evidence.

Court admonishes the jury and declares a recess at 12:20 p.m. to 2 p.m.

At 2:20 p.m. court reconvenes herein and all being present as before, including the jury, defendant, and counsel; Owen McGuigan and Louis Nault, respectively, are called, sworn, and testify for Gov't.

Owen McGuigan testifies further. Gov't Ex. 4, 5, and 6 are marked for ident. and admitted in evidence.

Mrs. J. A. (Irene) Oliver is called, sworn, and testifies for Gov't. Gov't Ex. 7 and 8 are marked for ident. and admitted in evidence.

It is stipulated that the jury is admonished and Court declares a recess at 3:35 p.m. At 4 p.m. court reconvenes herein and all being present as before, including the jury, defendant, and counsel.

Marie Germann is called, sworn, and testifies for Gov't. Gov't Ex. 9 and 10 are marked for ident. and admitted in evidence.

Mrs. Marie Koch is called, sworn, and testifies

for Gov't. Gov't Ex. 11 is marked for ident. and admitted in evidence.

Bertha Johnson and Chas. Lester, respectively, are called, sworn, testify for Gov't. Gov't Ex. 12 is admitted in evidence and Gov't Ex. 13 is marked for ident. and admitted in evidence.

Gov't rests. At 5:05 p.m. the Court admonishes the jury not to discuss this cause and excuses the jury to 10 a.m., April 21, 1948, and the jury leaves the court room. In the absence of the jury the Court and counsel discuss presentation of proposed instructions.

At 5:10 p.m. Court declares a recess in this trial until 10 a.m., April 21, 1948. [15]

At a stated term, to wit: The February Term, A.D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday, the 21st day of April in the year of our Lord one thousand nine hundred and forty eight.

Present: The Honorable Leon R. Yankwich, District Judge.

[Title of Cause.]

For jury trial; H. E. Champlin, Ass't U. S. Att'y, appearing as counsel for Gov't; Stuard Wegener, Esq., appearing as counsel for defendant, who is present; and the jury being present; coun-

sel stipulate that the jury has been admonished and at 10:48 a.m. the jury retires from the court room. In the absence of the jury Attorney Wegener moves to acquit on Count 2. Attorney Champlin states the Gov't does not oppose, and Court orders said motion granted. Attorney Wegener moves for acquittal on all other counts and argues in support. Court denies said motion. At 11:10 a.m. the jury returns into court, and defendant and counsel being present; Clem J. Cusack is called, sworn, and testifies in his own behalf. Def't's Ex. A and Plf's Ex. 13 and 14, respectively, are marked for ident. and admitted in evidence.

At 12:15 p.m. the jury is admonished and excused to 1:30 p.m. and the jury withdraws from the court room. In the absence of the jury, the Court and counsel discuss instructions to be given. At 12:30 p.m. court recesses to 1:30 p.m.

At 1:40 p.m. court reconvenes herein, and the jury, defendant and counsel being present, Attorneys Champlin and Wegener argue to the jury. The Court instructs the jury. Attorney Champlin asks for clarification of one instruction and counsel approach the bench and out of hearing of the jury discuss the matter. The Court then gives additional instructions to the jury. Counsel state no objections to instructions as modified.

G. Fuller is sworn as bailiff. At 3:12 p.m. jury retires to [16] deliberate. Instructions given and instructions refused by the Court are filed.

Court recesses until called. At 3:32 p.m. the jury request and on order of Court are given the Information, exhibits, and instructions.

At 4 p.m. court reconvenes herein, and the jury, defendant, and counsel being present, verdict is presented, read, and ordered filed and entered in minutes, to wit:

* * * *

Court orders cause continued to April 22, 1948, 10 a.m., for sentence, and that the cause be not referred to Prob. Officer; defendant to remain on bond. [17]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find the defendant, Clem J. Cusack,

Guilty as charged in Count 1 of the Information;
 Guilty as charged in Count 3 of the Information;
 Guilty as charged in Count 4 of the Information;
 Guilty as charged in Count 5 of the Information;
 Guilty as charged in Count 6 of the Information;
 Guilty as charged in Count 7 of the Information;
 Guilty as charged in Count 8 of the Information;
 Guilty as charged in Count 9 of the Information;
 Guilty as charged in Count 10 of the Information;

Dated: April 21, 1948.

/s/ MABEL S. QUARRY,
 Foreman of the Jury.

[Endorsed]: Filed April 21, 1948. [18]

At a stated term, to wit: The February Term, A.D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday, the 22nd day of April, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Leon R. Yankwich, District Judge.

[Title of Cause.]

For sentence on counts 1 and 3 to 15 incl.; H. E. Champlin, Ass't U. S. Att'y, appearing as counsel for Gov't; Stuard Wegener, Esq., appearing as counsel for defendant, who is present on bond;

Attorney Wegener makes a statement and moves to set aside verdict and to arrest the judgment, and argues in support. The Court makes a statement and orders both motions denied. Attorney Champlin makes a statement.

The Court pronounces judgment as follows: * * *

Court orders execution of judgment stayed until 5 p.m., May 24, 1948, and bond on appeal fixed at \$2,000.

Pre-sentence report is filed. Court orders defendant have until 5 p.m., April 23, 1948, to file consent of surety that bond remain in effect during stay of execution unless appeal bond is filed in the amount of \$2,000. [19]

District Court of the United States, for the Southern District of California, Central Division

No. 19,898—Criminal
Information—10 Counts 49 USC 311(a)

UNITED STATES OF AMERICA,

vs.

CLEM J. CUSACK.

JUDGMENT AND COMMITMENT

On this 22nd day of April, 1948, came the attorney for the government and the defendant appeared in person and by counsel, Stuard Wegener, Esq.

It is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offenses of Count 1, and 3-10 inc.; (Count 1) that on June 13, 1947, at Los Angeles, Calif., defendant, doing business as Lincoln Transfer & Storage Co., unlawfully did knowingly and wilfully for compensation sell and offer for sale transportation subject to the Interstate Commerce Act, to wit, transportation of property by motor vehicle in interstate commerce on public highways for compensation, and make contracts, etc., for transportation, without holding a broker's license issued by the I.C.C.; (other counts charged similar violations) as charged in said information and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It Is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant pay unto the United States of America a fine of \$100.00 on Count 1, a fine of \$100.00 on Count 3, a fine of \$100.00 on Count 4, a fine of \$100.00 on Count 5, a fine of \$100.00 on Count 6, a fine of \$100.00 on Count 7, a fine of \$100.00 on Count 8, a fine of \$100.00 on Count 9, and a fine of \$100.00 on Count 10; (making a total of \$900.00 in fines); and committed to an institution of the jail type until said fines are paid or he is discharged therefrom by due process of law.

It Is Ordered that execution on said fines is stayed until 5 p.m., May 24, 1948.

Note: Count 2 was dismissed by order of Court on April 21, 1948.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant, if said fines are not paid.

/s/ LEON R. YANKWICH,
United States District Judge.

[Endorsed]: Filed April 22, 1948. [20]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Offense: Nine (9) informations charging violations of 49 USC 311(a).

Concise statement of judgment or order, giving date, and any sentence: Judgment dated April 22, 1948, imposing fine of \$100.00 on each of the nine in-

formations convicted, totalling the fines to the sum of \$900.00, not committed on the fine.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the above-entitled judgment.

Dated: May 3, 1948.

/s/ STUARD WEGENER,
Appellant's Attorney.

[Endorsed]: Filed May 3, 1948. [21]

[Title of District Court and Cause.]

**ORDER EXTENDING TIME WITHIN WHICH
TO DOCKET THE RECORD ON APPEAL**

Upon the reading of the affidavit of Stuard Wegener and good cause appearing therefor, It Is Hereby Ordered, pursuant to Rule 39 (c), the New Federal Rules of Criminal Procedure, that appellant may have to and including July 12, 1948, within which to docket the record on appeal.

Dated: June 11th, 1948.

/s/ PAUL J. McCORMICK,
Judge, United States District Court.

AFFIDAVIT OF STUARD WEGENER

State of California,
County of Los Angeles—ss.

Stuard Wegener, being first duly sworn, deposes and says that: Time for docketing record on appeal is June 12, 1948.

He is one of the attorneys for the defendant and appellant in the above entitled action. He has requested the court reporter, Henry A. Dewing, that he prepare the reporter's transcript in the above case. During the time that said reporter was to prepare the transcript, he took sick and informs affiant that he has been unable to prepare the reporter's transcript but that he believes that he will be able to have it completed within ten days to two weeks.

Affiant has paid said court reporter the necessary deposit for the preparation of said transcript.

Accordingly, affiant requests, pursuant to Rule 39 (c), the [23] New Federal Rules of Criminal Procedure, that time within which appellant may have to docket the record on appeal be extended to and including July 12, 1948.

/s/ STUARD WEGENER,

Subscribed and sworn to before me this 11th day of June, 1948.

/s/ MIWAKO YANAMOTO,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed June 11, 1948. [23]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the above-entitled Court:

You will please prepare a transcript of record in this cause to be filed in the office of the Clerk of

the United States Circuit Court of Appeals, for the Ninth Circuit, under the appeal heretofore taken herein, and include in said transcript the entire record, with the stipulation the original exhibits be forwarded and not transcribed.

Dated this 14th day of June, 1948.

/s/ STUARD WEGENER,
Attorney for Defendant.

[Affidavit of Service by Mail attached.]

[Endorsed]: Filed June 15, 1948. [26]

[Title of District Court and Cause.]

**AFFIDAVIT AND ORDER FOR EXTENDING
TIME FOR FILING RECORD ON APPEAL
IN CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT**

State of California,
County of Los Angeles—ss.

George A. Willson, being by me first duly sworn, deposes and says:

That he is one of the attorneys of record for the defendant, Clem J. Cusack, in the above entitled action; that the time for filing the record on appeal in the Circuit Court of Appeals for the Ninth Circuit will expire today, July 12, 1948, and that the transcript of the record in case number 19898, criminal, has not been produced as of this date because the reporter Mr. Henry Dewing has been ill, and the defendant Clem J. Cusack and his attorney,

your affiant, did not learn of said illness until July 12, 1948, therefore, the defendant by and through his attorney George A. Willson, affiant herein, respectfully requests this court to enlarge the time to file the transcript of record in the above entitled matter.

/s/ GEORGE A. WILLSON [28]

Subscribed and sworn to before me this 12th day of July, 1948.

(Seal)

EDMUND L. SMITH,
Clerk, U. S. District Court,
Southern District of Calif.

By /s/ THEODORE HOCKE,
Deputy.

ORDER

The affidavit of George A. Willson, attorney of record for Clem J. Cusack, defendant in action number 19898, Criminal, in the above entitled court having been filed, and good cause shown therein for the enlargement of the time in which to file the transcript of record in the above entitled matter on appeal in the Circuit Court of Appeals for the Ninth Circuit is extended from July 12, 1948. to July 31, 1948.

It Is So Ordered: This 12th day of July, 1948.

/s/ PAUL J. McCORMICK,
Judge, United States District Court.

[Endorsed]: Filed July 12, 1948. [29]

[Title of District Court and Cause.]

AFFIDAVIT AND ORDER FOR EXTENDING
TIME FOR FILING RECORD ON APPEAL
IN CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

State of California,
County of Los Angeles—ss.

George A. Willson, being by me first duly sworn,
deposes and says:

That he is one of the attorneys of record for the
defendant, Clem J. Cusack, in the above entitled
action; that the time for filing the record on appeal
in the Circuit Court of Appeals for the Ninth Cir-
cuit was continued until July 31, 1948, and that the
transcript of the record in case number 19898,
criminal, has not been produced as of this date be-
cause the reporter Mr. Henry Dewing has been ill
and at this time continues to be ill, therefore, the
defendant by and through his attorney George A.
Willson, affiant herein, respectfully requests this
court to grant another extension of time in which to
file the transcript of record in the above entitled
matter.

/s/ GEORGE A. WILLSON. [30]

Subscribed and sworn to before me this 29th day
of July, 1948.

(Seal) /s/ HARRY L. RICHARDSON,
Notary Public in and for the County of Los An-
geles, State of California.

ORDER

The affidavit of George A. Willson, attorney of record of Clem J. Cusack, defendant in action number 19898, Criminal, in the above entitled court having been filed, and good cause shown therein for the enlargement of the time in which to file the transcript of record in the above entitled matter on appeal in the Circuit Court of Appeal for the Ninth Circuit is extended until September 30, 1948.

It Is So Ordered: This 29th day of July, 1948.

/s/ J. F. T. O'CONNOR,

Judge, United States District Court.

[Endorsed]: Filed July 29, 1948. [31]

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR FILING
ORIGINAL EXHIBITS

It is stipulated by the parties through their attorneys in the above entitled matter that the original exhibits may be forwarded on appeal in lieu of certified copies of the evidence being made that an order may be so made.

Dated this twenty-seventh day of September, 1948.

GEORGE A. WILLSON,
STUARD WEGENER,

By /s/ GEORGE A. WILLSON,
Attorneys for Defendant.

/s/ JAMES M. CARTER,
U. S. Attorney,

/s/ ERNEST A. TOBIN,
Asst. U. S. Attorney,

Attorneys for United States of America, Plaintiff

ORDER

The stipulation of the parties by and through their attorneys of record in Action 19898-Criminal in the above entitled court having been filed, it is hereby ordered that the original exhibits of the evidence in the above entitled matter may be forwarded on appeal in lieu of certified copies.

It Is So Ordered: This 27th day of September, 1948.

/s/ LEON R. YANKWICH,
Judge, United States District Court.

[Endorsed]: Filed Sept. 27, 1948. [33]

In the District Court of the United States, Southern District of California, Central Division

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 33, inclusive, contain full, true and correct copies of Information; Minute Orders Entered March 15, April 20 and 21, 1948; Verdict; Minute Order Entered April 22, 1948; Judgment and Commitment; Notice of Appeal; Designation of Record on Appeal; Three Affidavits and Orders Extending Time to File Record on Appeal and Stipulation and Order re Original Exhibits which, together with copy of reporter's transcript of proceedings on April 20 and 21, 1948 and original plaintiff's Exhibits Nos. 1 to 14, in-

clusive, and original defendant's Exhibits A and B, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$8.95 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 27th day of September, A.D. 1948.

(Seal)

EDMUND L. SMITH,
Clerk.

In the District Court of the United States for the Southern District of California, **Central Division.**

Honorable Leon R. Yankwich, Judge Presiding.

No. 19,898

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLEM C. CUSACK,

Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

April 20, 1948

Appearances: For the Plaintiff: James M. Carter, Esq., United States Attorney; Herschel E. Champlin, Esq., Assistant United States Attorney. For the Defendant: Stuard Wegener, Esq. [1 *]

Los Angeles, California, Tuesday, April 20, 1948,
10 a.m.

The Court: Do you desire to make an opening statement?

Mr. Champlin: Yes, your Honor, the Government desires to make a short opening statement.

The Court: Ladies and gentlemen of the jury, for the information of those who have not sat on cases before, an opening statement, whether made in a civil or a criminal case, or whether made in a State or Federal Court, is always the same; it is

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

not proof of anything. Counsel is merely stating to you what they expect to prove. The proof will come to you through witnesses and documentary evidence to be presented in this court. They are merely telling you what they expect to prove. Some of the things they say they might prove them might not be able to prove, because the Court might exclude testimony relating to them. With that understanding Mr. Champlin will make the opening statement for the Government.

Mr. Camplin: Ladies and gentlemen of the jury, as the Court instructed you, this charge is in ten counts of the information, for arranging for and making contracts for interstate transportation, the defendant not having a broker's license, according to the Interstate Commerce Act.

The Government expects to prove that the defendant does not have such a license. It will prove by its witnesses that the defendant did make arrangements, and he did make contracts [3] for compensation, and that he procured business for the transportation of goods. The Government will ask the Court for an instruction that interstate transportation simply means from one State to another.

The Government expects to show that contracts were entered into. They were arranged for, and compensation was paid to the defendant. He had no authority from the Interstate Commerce Commission to act as a broker. We expect to prove that he was not a broker, or a person defined as a broker, according to the Court's instruction.

The next thing which may come to your mind is why a permit is necessary, but that is a matter

of law. It is in the Interstate Commerce Act.

Briefly, it requires such person, carrying on this type of business, should have secured a bond, if the permit is issued, so that he will be financially responsible on such contracts and engagements which he makes, in seeing that they are carried out, in the transportation of goods by motor carrier. The facts are very simple. You have all seen the huge vans and motor trucks moving household goods. Each of the ten counts of the information are almost identical, except they deal with different members of the public who were contacted by the defendant, either by advertisement or over the telephone, or otherwise, in his business.

That is the sum and substance of it, and at the close of [4] all the evidence the Government will ask you to bring back a verdict of guilty as to all of the ten counts. That is all the statement the Government desires to make at the present time.

The Court: Do you desire to make a statement at the present time? That is your privilege, but if you want to wait until the Government has concluded and make it at that time you may.

Mr. Wegener: I will wait until the Government concludes.

The Court: So as not to break the continuity, we will declare a short recess. The Court admonishes the jury not to converse among themselves nor with anyone else, on any subject connected with the trial, and not to form or express an opinion thereon until the case is finally submitted to you.

(Short recess.)

The Court: Let the record show that the jury is

in the box, and the defendant in Court with his counsel.

Call your first witness.

MARVIN YOUNG,

a witness called by and on behalf of the Government, having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Marvin Young. [5]

Direct Examination

By Mr. Champlin:

Q. What is your occupation, Mr. Young?

A. Radio executive.

Q. Whereabouts do you live?

A. Los Angeles; at the present time 4432 Farmdale Avenue, North Hollywood.

The Court: I think it would be an appropriate idea, if, as a witness is called, you will designate the count, Mr. Champlin. This is Count IV?

Mr. Champlin: Count IV.

Q. How long have you lived in Los Angeles, Mr. Young?

A. Prior to my going into the service, 20 years.

Q. I direct your attention to the date of approximately March 10, 1947. You were living in Los Angeles at that time? A. I was.

Q. Did you have occasion to see the defendant Cusack on or about that day? A. I did.

Q. How did that meeting take place, Mr. Young? How did you get together?

(Testimony of Marvin Young.)

A. Initially through an advertisement in the Los Angeles Examiner, in which he quoted rates for moving household goods from Los Angeles to various points throughout the country. [6]

Q. Did you see Mr. Cusack at his place of business or your place of business, or his home?

A. At my home, at that time.

Q. Did he call in person? A. In person.

Q. What was your conversation with him at that time? What did you say and what did he say?

A. We discussed the moving of these household goods which belonged to my mother and father-in-law, who were contemplating moving from Cedar Rapids to Los Angeles. We did not know the weight of the goods, and so forth, and he did not know, in the telephone conversation, the rate he would charge on that occasion, and his call was to discuss the final arrangement for the movement of these goods.

Q. These goods were in Cedar Rapids, Iowa?

A. Yes.

Q. Where did you desire them moved to?

A. Gardena, California.

Q. Did you enter into arrangements with Mr. Cusack to move the goods to Gardena?

A. Yes, I did.

Q. What transaction took place?

A. A form, a carbon of which I have here in my hand.

The Clerk: This is Plaintiff's Exhibit No. 1 for identification. [7]

(Testimony of Marvin Young.)

Q. This exhibit which has been marked Government's Exhibit No. 1—did Mr. Cusack, the defendant, sign it in your presence?

A. He did.

Q. Point out where his signature appears on the paper.

A. In this spot over here, and again at the bottom.

Q. What does that paper purport to be, as you understand it?

A. Arrangement to move our household goods from Cedar Rapids to Gardena, California.

Q. Was there any consideration attached for this movement, on your part? Did you pay him any money?

A. I did.

Q. How much money was paid?

A. \$50.00.

Mr. Champlin: At this time the Government offers in evidence Plaintiff's Exhibit No. 1 marked for identification.

The Court: It will be received.

The Clerk: Plaintiff's 1 in evidence.

Q. My Mr. Champlin: Did you see in the defendant's presence or possession any moving vans or trucks or equipment to move this furniture?

A. No.

Q. As a matter of fact, did he move it to your designated place for you? [8]

A. He did not.

Q. What took place in between the time the defendant signed the paper, and you paid him \$50.00? What transpired from that date until the transaction was closed?

(Testimony of Marvin Young.)

A. In substance, one of the reasons why we had signed this agreement with him was the fact that he agreed to transport these goods between certain dates. In accordance with these arrangements my mother and father-in-law in Cedar Rapids sold their place, and guaranteed possession of the place between the dates he guaranteed he would have the van.

The van was to call between March 24 and March 31. On April 1st they communicated with us, and said the van had not arrived, and I called Mr. Cusack. I tried to get in touch with him several times, which I could not do.

I then called the Interstate Commerce Commission, and explained my situation to them, and stated to them that I had relied on the fact that he was operating under their auspices, and asked them to take some action. Whereupon they called me back and said they had communicated with Mr. Cusack and he would call me.

On April 2nd he called me, and said a van would call there in Cedar Rapids, and we immediately called Cedar Rapids, and we told them that information, and suggested, to confirm this, that they get in touch with the Von der Ahe Moving Company, which Mr. Cusack stated was his carrier in St. [9] Louis, and find out from them exactly what day they would arrive.

Subsequently my brother-in-law communicated with us by means of a wire, in which he, in sub-

(Testimony of Marvin Young.)

stance stated that the St. Louis firm knew nothing of the order at all. This was after March 31st, which was the termination date Mr. Cusack gave us that the van would call at Cedar Rapids.

Immediately subsequent to that we wired back and said to find out when they could send the van. My brother-in-law called up on the phone and said that Mr. Von der Ahe of St. Louis said they did not know when the van would call for the goods, and suggested that we get another carrier, which we did, at Cedar Rapids, and that van brought the goods out.

Q. You said that Mr. Cusack represented to you that a Von der Ahe truck would pick up your goods and deliver them to you in California?

A. That was so stated over the phone.

Q. Was any restitution of the money made?

A. Subsequently a letter in my own handwriting was sent to Mr. Cusack by registered mail, requesting the money. I heard nothing from the letter. I again called the Interstate Commerce Commission, who were cooperative. They said they would get in touch with him. Subsequently he called me up and said he was making out a check, on that day, and that I should receive it by Saturday. A week or ten days went by; [10] but I did receive the \$50.00 back.

Q. What company in California did Mr. Cusack represent he was working for, or doing business under what name?

A. Lincoln Van and Storage Company.

(Testimony of Marvin Young.)

Mr. Champlin: You may cross examine.

Cross Examination

By Mr. Wegener:

Q. Mr. Young, when you called the defendant's office, was that, as you state, the result of the advertisement in the Los Angeles Examiner quoting rates between points? A. That is correct.

Q. At the time you called him did you inquire of him just how he was going to handle your shipment? A. Yes, by motor carrier.

Q. Would you try and relate, as closely as you can, the conversation, when you first called the defendant?

A. In substance, the first conversation was about the rates, and Mr. Cusack said the rates quoted in the paper were not for westbound freight, but for shipments moving from Los Angeles to the places he quoted. I then stated we had these goods in Cedar Rapids, and did he have a truck calling in that area approximately the end of March. That was the only direct reference to transportation.

Q. Did you ask him what his rates per hundred weight would be on the movement of household good between Cedar [11] Rapids and California?

A. Yes.

Q. Did you inquire of other carriers?

A. I did.

Q. Did the other carriers give approximately the same answer, or what was the conversation?

(Testimony of Marvin Young.)

A. Pertaining to rates?

Q. Rates, service, and promise of loading, and so forth.

A. Those questions were each asked of the other carriers, as to whether they would have a truck at Cedar Rapids approximately that date, and the cost per hundred pounds, and so forth. In substance it was the same inquiry I directed to Mr. Cusack.

Q. Were the rates per hundred weight the same?

R. No, I think Mr. Cusack quoted a rate which was slightly under the rate of the companies we called.

Q. What type of service did the rest of the companies offer?

A. They offered similar service. The major difference between that Mr. Cusack offered and the other concerns, was (a) the rate, and (b) the time when they could pick up the goods. Some stated that it would be sometime after we wanted the goods picked up, and the rates were higher.

Q. Did any other carrier make your acquainted with the fact that a bottle neck existed as to goods moving from the [12] east to the west coast at that time?

Mr. Champlin: That is objected to as immaterial.

The Court: The only question is whether the defendant had the license required. Whether the goods were actually transported, or he gave service for the money, is not material in this case.

Mr. Wegener: The Act reads, whoever, for com-

(Testimony of Marvin Young.)

pensation sells transportation, subject to the Act, without a certificate to operate as a broker, except if the man is operating or working as an employee of a company or an agent of a bona fide carrier with a license to operate between those two points, he is without the brokerage section of the Act.

The Court: You may ask him whether the inquiry was directed to figuring out whether he was employed by some concern engaged in the business.

Mr. Wegener: That is right.

The Court: The objection will be sustained. That goes to the quality of service. You may ask whether Mr. Cusack informed him whether he was acting for somebody else, or whether the named company supplied the transportation.

By Mr. Wegener: Q. Did you ask the defendant who the carrier was he was representing on this shipment of household goods between Cedar Rapids and California?

A. No, I did not.

Q. The shipment was loaded by some company on March 10, [13] 1947?

A. No, the initial agreement was signed, which was introduced a moment ago, that agreement was signed on March 10th. The pickup of the goods was to be, according to the agreement, between March 24th and March 31, which was the last week of the month.

Q. The deposit which you gave the defendant of \$50.00, I believe you stated was returned to you,

(Testimony of Marvin Young.)

and you arranged with some other carrier, or some other means of getting your goods moved from Cedar Rapids, to California?

A. That is correct.

Mr. Wegener: That is all.

The Court: Any redirect?

Mr. Champlin: No.

The Court: Call your next witness.

ETHEL HOLMAN,

a witness on behalf of the Government, being first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Ethel Holman.

Direct Examination

By Mr. Champlin:

Q. This inquiry relates to Count VI, ladies and gentlemen.

Mrs. Holman, where do you reside, please? [14]

A. 1818 East Third, Long Beach.

Q. Did you reside there on or about May 21, 1946? A. Yes, sir.

Q. Did you have occasion on or about that date to see the defendant, Mr. Cusack? A. Yes, sir.

Q. Where did you see him? A. At my home.

Q. How was the interview arranged with him?

A. By telephone.

Q. Did you call first?

A. Yes, sir, I called a number that was in an advertisement in the paper.

(Testimony of Ethel Holman.)

Q. Talk louder.

A. I called a telephone number that was in the paper, in the newspaper.

Q. Do you happen to recall that number?

A. No, but I believe it is on the paper that I turned over to the man that served me.

Q. To refresh your memory, would it be Drexel 2597?

A. That is the Los Angeles number. This was a Long Beach number.

Q. At the time you talked to Mr. Cusack, what was the substance of the conversation? What did you say, and what did he say? [15]

A. I had some goods in Chicago that I wanted brought to Long Beach, and he said he had service vans that would pick it up.

Q. I am afraid this gentleman can't hear over here. Repeat your answer, if you will, Mrs. Holman.

A. I called the number, and he said he had service of vans that made contact in Chicago that would pick up my goods and bring them to Long Beach. He quoted me a price, but it would be charged according to weight. I was anxious to get the goods. He promised delivery within ten days or two weeks, if I would give him a check of \$50.00. Your report says \$45.00, but I paid him \$50.00 and he took \$5.00 off for his commission which the Better Business Bureau advised me at the time to let him have, but it cost me much more than \$5.00 with my telephone calls and my wires.

(Testimony of Ethel Holman.)

Q. Did he sign a paper in your presence at that time? A. Yes, sir.

The Clerk: Plaintiff's Exhibit 2 for identification.

By Mr. Champlin: Q. I will show you Government's Exhibit marked for identification No. 2, and ask you if this is the paper that the defendant Cusack signed in your presence? A. Yes, sir.

Q. Would you show where his signature appears on the paper? [16] A. Here.

Q. Whose signature is that? A. His.

Mr. Champlin: The Government offers this exhibit in evidence.

Q. What does the paper purport to be, so far as you know?

A. Well, it was a sort of, I would say, bill of lading, as to what I was to have shipped out here, and what I was to pay.

Mr. Champlin: The Government offers this in evidence as Government's Exhibit 2.

The Court: It may be received.

The Clerk: Government's Exhibit 2 in evidence.

By Mr. Champlin: Q. Mrs. Holman, were your goods moved from Chicago to Long Beach by the defendant? A. No, sir.

Q. What transpired between the time that you saw this paper signed and you paid him \$50.00? What transpired, will you tell us?

A. Yes, I waited a reasonable length of time. He told me ten days or two weeks. I waited three or four weeks, and the fourth week I tried to con-

(Testimony of Ethel Holman.)

tact him with the telephone number I had, that I had taken from the newspaper, and was unable to do so. [17]

Finally I called again and told the girl in the office to have him call me, which he did not do. Then I had no other way out that I could see. I called the Better Business Bureau. I am a widow, and I can't afford to have \$50.00 of mine that I don't get any service for. So I called the Better Business Bureau. They contacted Mr. Cusack, and I waited then a certain time,—I don't know how long, but I believe about two weeks. The first contact was in May. This was in July, and finally Mr. Cusack called me and told me if I would give him until the fifth of July he would have my goods picked up.

I called the Better Business Bureau back, and he said I should grant him that time, which I did. I also wired to Chicago to the place these goods was, and told them if they were not picked up on or about the fifth, to call me or wire me immediately, which they did. And it was the seventh when they called me. They said it had not been picked up; no one had called; no one had been there. So I called the Better Business Bureau and they contacted Mr. Cusack, and told Mr. Cusack to refund my money. He sent me a money order of \$45.00, which they told me I should accept, and I did, but I paid him fifty.

Q. Did Mr. Cusack represent to you what company, or moving van, would move the goods?

(Testimony of Ethel Holman.)

A. The Lincoln Transfer, he said it was, in Los Angeles; he said he was the Lincoln Transfer.

Q. Did he represent that he or the Lincoln Transfer [18] Company would move your goods from Chicago? A. Yes, sir.

Q. Did you make other arrangements for another company to bring your goods out?

A. I did.

Mr. Champlin: Cross examine.

Cross Examination

By Mr. Wegener:

Q. Mrs. Holman, when you talked with the defendant, did you ask him if he was going to be the carrier and perform the service between Chicago and Los Angeles? Did you ask him any questions relating to that at all?

A. Yes, I asked him who was the Lincoln Transfer. He said he was; that he owned that.

Q. Did you ask who the carrier was he would have in operating between Chicago and Los Angeles?

A. He said he had vans he did business with. It was such a small amount that they in turn would make some arrangements between them to have it picked up there, and brought here to Long Beach.

Q. At the time you talked with the defendant, did you inquire of any other company as to the movement of moving goods between Los Angeles and California?

A. No. He was the only man that I talked to up to until I couldn't get any results from him.

(Testimony of Ethel Holman.)

So I had to call [19] Chicago, and have the people that had moved me for twenty years,—they were the people that brought the goods out.

Q. Who was the party with whom you talked or arranged to have them brought out here from Chicago?

A. Do you mean the people who finally moved me?

Q. Yes.

A. I wired DeWall's Moving Company. They had been in business for fifty years, on Western Avenue, in Chicago. They are brothers. They brought my household goods out here.

Q. Do you have a copy of the freight bill DeWall gave you when they delivered the goods out here?

A. I don't know whether it is attached to the other one.

Mr. Champlin: I object as incompetent and immaterial, if some other company did move the goods out.

Mr. Wegener: The question is not irrelevant, your Honor? I am trying to show that she contacted an agent of another carrier in Chicago, and that the agent of the other carrier did arrange to transport, through their principal, the goods out here. There are only a few companies who have a certificate to operate between two points. The DeWall Transfer, she speaks of, acted in the same capacity in Chicago as the defendant in Los Angeles.

(Testimony of Ethel Holman.)

Mr. Champlin: It is still irrelevant and immaterial.

The Court: What became ultimately of the goods is not material. That she communicated with others in connection with [20] the defendant is absolutely immaterial. If she arranged to have them transported through someone else, and those services were performed, then, of course, that is material merely on the question of whether he actually rendered services, or simply pocketed the money. That isn't even material, except to show intent to violate the law. This case is a very simple case: Was this man authorized to act as a broker? They have to show first that he made contacts. That's what this witness testified to. Then the Government will object that he did not have a license to act as a broker, but whether the goods were actually transported or not is immaterial.

Mr. Wegener: Your Honor, the acts of the agent are exceptions to the statute. The agent does not require a broker's license.

The Court: This witness testified she called up a transportation company which completed the contract, and the transportation company, so far as she knew, was not connected at all with the defendant or anyone else. In other words, as I gather that was her own idea to call up the DeWall Company. He did not tell you to call the DeWall Company?

The Witness: No.

(Testimony of Ethel Holman.)

The Court: You knew them?

The Witness: For 25 years or better.

The Court: The objection will be sustained for the [21] reason I have indicated.

Ladies and gentlemen of the jury, I want you to bear in mind that all these discussions with counsel are merely discussions on the law. I am not deciding the facts in the case. I have ruled on the admissibility of certain questions, as it is my custom, and the custom of all of us, and the courts, when they do so generally give counsel the courtesy of giving the reason, although a Judge does not have to state the reason. You are not to draw any inference from the mere fact that I have stated certain legal principles, that I am passing judgment on the facts, or any of the facts of the case. Proceed.

By Mr. Wegener: Q. Mrs. Holman, take Plaintiff's Exhibit No. 2. I would like to have you look at the document, if you please. Will you state the section relating to the amount of money which you gave the defendant; what prepayment you gave the defendant?

Will you read the part of the exhibit?

A. Do you mean received \$45.00?

Q. That's right.

A. But he received \$50.00. He did not receive \$45.00. He took my personal check for \$50.00. I got a money order back for forty-five.

Q. Did you get the paper at the time you gave him the check, or did you get the paper after the time you gave him the check? [22]

(Testimony of Ethel Holman.)

A. I got it right the day I gave him the check. In fact, I had this in my hand first.

Q. Why would he give you a receipt or a document showing \$45.00 received, and you actually gave him a check for \$50.00?

A. I was looking to see my personal check, but I don't have it with me. I can produce it. I will have it.

The Court: Do you live in town?

The Witness: Long Beach.

By Mr. Wegener: Q. Did you have any arrangement with the defendant about the disposition of the \$5.00? Was it for wires or communications?

A. No, that was his idea; not mine.

Q. What did he say? Why did he put in \$45.00 when you gave him \$50.00? Did he say anything about the difference? A. No, sir.

By Mr. Wegener: Q. At the bottom of the document, where the defendant signed it,—would you refer to that section of the document?

The Court. He means this where it says "Lincoln, by C. J. Cusack."

The Witness: What do you want to know?

By Mr. Wegener: Q. Would you just read the signature there, signed by the defendant after "Carrier or Agent"? [23]

A. "Carrier" is crossed out, and then it says "or agent." Then over to right it says "Lincoln." Then his signature.

Q. In other words, the word "Carrier" was stricken out, but the word "Agent" remains exposed? A. That's right.

(Testimony of Ethel Holman.)

Q. You have stated that you were returned \$45.00 by a money order? A. Yes.

Mr. Wegener: That is all.

The Court: Step down, please. Call your next witness. You may be excused, Mrs. Holman.

(Witness excused.)

FRANCIS DAMBACH,

a witness called by and on behalf of the Government, having been first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Francis Dambach.

Mr. Champlin: This refers to Count VII.

Direct Examination

By Mr. Champlin:

Q. Where do you reside?

A. 1177 West 28th Street, Los Angeles.

Q. Did you live there on or about October 28, 1946?

A. No, I didn't. I moved there last April. [24]

Q. Where did you live in October, 1946?

A. At 1982 Bonsello Street, Los Angeles.

Q. Did you see the defendant Cusack on or about that date, October, 1946? A. Yes, I did.

Q. How did you arrange the meeting with Mr. Cusack? What directed you to him, or him to you at that time?

A. I saw an advertisement in the paper, a Drexel number to call. I communicated with him, and

(Testimony of Francis Dambach.)

talked to him on the phone, and asked him to come out to the house.

Q. Where did you see the advertisement?

A. In the Los Angeles Examiner.

Q. You don't remember the telephone number, do you?

A. Drexel 5 something. I don't remember the rest.

Q. What transpired at the time he called at your home? What conversation took place; that is, what did you say and what did he say?

A. Well, I told him that I had a few household goods that I wanted shipped out from Charle-roi, Pennsylvania. I asked him—of course, the rate was quoted in the paper. The reason I called him was because he appeared to be cheaper than the rest. He said, "How much do you have?" He said, "It wouldn't be over a thousand pounds, would it?"

I said, "I don't imagine so, because there are only some heavy trunks, a few odds and ends." He said it wouldn't [25] amount to over a hundred dollars. When it arrived, it was over three hundred dollars.

Q. Do you know what company moved the household goods?

A. I think it was Von der Ahe, St. Louis.

Q. How much did you pay Mr. Cusack as to his part of the transportation? A. \$20.00.

Q. Was that paid at the same time you signed some paper or he signed some paper closing the agreement? A. That's right.

(Testimony of Francis Dambach.)

Q. Did he sign any paper in your presence at the time you gave him the \$20.00?

A. He signed,—it looked like a yellow sheet of paper, or a contract.

Q. Did he give that to you at the time?

A. Yes, he did.

Q. I show you this paper and ask you if that is the same one that you received at that time?

A. Yes, this is it.

Mr. Champlin: I would like to have this marked for identification Government's Exhibit 3.

The Court: All right.

The Clerk: Government's Exhibit 3 for identification.

(Shows the same to counsel.)

Mr. Champlin: The Government offers this exhibit in [26] evidence, your Honor.

The Clerk: Is it admitted, your Honor?

The Court: It may be received.

The Clerk: Government's Exhibit 3 in evidence.

Mr. Champlin: Cross examine.

Cross Examination

By Mr. Wegener:

Q. Mrs. Dambach, the amount that you gave to the defendant at the time that this instrument was executed you gave to the defendant in a check at that time, did you? A. No, I gave him cash.

Q. He gave you this document which showed the receipt of the total amount of money?

A. That's right.

(Testimony of Francis Dambach.)

Q. Your shipment was loaded some later date from this instrument by some carrier and was delivered to your house here in Los Angeles?

A. Yes.

Q. It was through the instrumentality of the defendant that that transportation service was arranged? A. Yes.

Q. The original document was given to you by the defendant at the time you talked to him, it was a quotation given to you on approximately what he thought it would cost you to have the goods moved out here? [27]

A. That's right; he told me it would run around \$100.00; otherwise I would not have sent for it. It wasn't worth any \$352.00.

Q. When the shipment arrived you had to pay \$352.00? A. That is right.

Q. Was that charged based on the weight of the shipment? A. That's right.

Q. It weighed more than you expected it would weigh? A. Yes, it did.

Q. The amount of money that you gave the defendant at the time the order was taken, was that amount of money deducted from the amount to be collected on delivery?

A. Now, I am not sure of that whether it was or not, because I never could find that one bill. I know the driver told me it amounted to \$352.00 when he delivered it to the door. I didn't have the money to pay for it, and it had to go to storage.

(Testimony of Francis Dambach.)

Q. So later you had to have the goods moved from storage?

A. I paid the payments until I got it out.

Q. When you paid the money the defendant or whoever you paid the money to gave you a copy of the freight bill, the bill of lading of that shipment moving here from Pennsylvania? A. Yes.

Q. Do you have a copy of that with you? [28]

A. I think Mr. McGuigan of the National Van Lines has it. He was the one who took my furniture over from the storage.

Q. Did he give it to you when the goods were moved from the warehouse? A. No, he has it.

Q. What I am asking you, Mrs. Dambach, is that when you paid the charges, in other words, the \$325.00, you got a receipt from whomever you paid the money to? A. Yes, sir.

Q. Do you have that with you?

A. Yes, I have.

Q. Can you produce that before the day is out for the inspection of the Court?

A. Yes, I have it.

Q. The receipt that I have which is an itemization that appeared on the receipt, it shows—

The Court: She doesn't have to read it because we can put it in as an exhibit unless you want to ask a question.

Mr. Wegener: I merely thought she might want to read it, your Honor, the itemization.

The Court: I can read it into the record.

Mr. Wegener: Would your Honor do that?

(Testimony of Francis Dambach.)

The Witness: This is the receipt when I paid the balance.

The Court: And you paid the balance on October 20th, [29] 1947, is that correct?

The Witness: That is right.

The Court: Pay to J. C. Ritchie for the National Van Lines, Incorporated—

Mr. Wegener: Just the section relating to the accrued charges and the payment, your Honor.

The Court: The National Van Lines.

Mr. Wegener: It looks like the invoice is the National Van Lines, Incorporated, May 6, 1947.

The Court: Mrs. Francis Dambach, 1177 West 28th Street, Lot No. 26269. Transportation charges from Charleroi, Pennsylvania, to Los Angeles, California, \$10.92 cwt. \$335.79. 3% tax \$10.00. \$345.87. Paid to C. J. Cusack \$30.00—\$315.87. \$277.87 balance \$80.00. And below that \$80.00 paid but no indication when. Balance due \$197.87. Then below that in pencil is: Paid to J. C. Ritchie for National Van Lines, Inc., 10-20-47.

By Mr. Wegener: Q. Mrs. Dambach, in looking at that receipt, the amount paid to the defendant was given credit to you on the amount of the bill, was it not? A. Yes.

Q. You mentioned that a St. Louis truck delivered the shipment. Do you remember the name of the truck or the carrier that delivered the goods here to you in Los Angeles? [30]

A. The name of the carrier?

Q. Yes, or the truck?

A. Von der Ahe.

(Testimony of Francis Dambach.)

Mr. Wegener: That will be all.

Mr. Champlin: Nothing further.

The Court: We are about to adjourn until 2:00 o'clock this afternoon. The Court reminds you not to talk among yourselves or with anyone else on any subject connected with the trial of this case or to form or express an opinion thereon until the case is finally submitted to you.

(Whereupon, an adjournment was taken until 2:00 o'clock p.m. of the some day.) [31]

Los Angeles, California, April 20, 1948,
2:00 o'clock p.m.

The Court: Let the record show the jury are in the box and the defendant is here in court with his counsel.

Mr. Champlin: The Government will call Mr. McGuigan.

OWEN McGUIGAN,

a witness called by and on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Champlin:

Q. What is your occupation, Mr. McGuigan?

A. Resident or district manager for the National Van Lines.

Q. Is that a transfer storage company or a van line that does business in interstate commerce?

(Testimony of Owen McGuigan.)

A. That is right, in 39 states.

Q. Your residence is here in Los Angeles, is that right?

A. My office is in Los Angeles, my residence is in Glendale.

Q. How long have you been in that capacity, Mr. McGuigan? A. Since July 5, 1946.

Q. Directing your attention to the date of approximately October 8, 1946, in connection with the testimony of the last witness, did you hear the testimony of Mrs. Francis Dambach? [32]

A. Yes, I did.

Q. Do you know a company by the name of the Von Der Ahe Van Lines of St. Louis?

A. Yes, the Von Der Ahe Moving Storage Company of St. Louis were at that time an agent to the best of my recollection for the Van Lines.

Q. Agent for your company?

A. That's right.

Q. Do you recall and do you know of your personal knowledge that the Von Der Ahe did move some household furniture for Mrs. Dambach of Los Angeles?

A. Yes, the National Van Lines; it was furnished with a billing issued by the Von Der Ahe people, our agents.

Q. Were you directed by subpoena to bring certain papers with you to the court room today in connection with that shipment? A. I was.

Q. Do you have those papers with you?

A. Yes, I do.

(Testimony of Owen McGuigan.)

Q. Produce them, please.

A. This is the entire file on the Dambach shipment.

Q. Open it and state what the papers purport to be. They gave the Von Der Ahe Company authority to bring their shipment to Los Angeles?

A. The Von Der Ahe people requested the National Van [33] Lines to furnish them with a bill of lading to move a certain shipment of household goods from Charleroi, Pennsylvania, to Los Angeles. This was done under date of December 26, 1946, on our Order 26269.

Q. That was dated December, 1946?

A. That's the date that this billing was issued according to this record.

Q. Is there a bill of lading or settlement sheet or some document customarily used in the trade that would indicate that shipment?

A. No, not in this file, this record. It might be in the Chicago office. They were not requested in the service; otherwise I would have them. However, I am familiar with the basis of settlement with the Von Der Ahe people in such matters as this.

Q. Do you know what the fare was and what was received?

A. In this particular shipment the Von Der Ahe people representing themselves as agents and sales agent National Van Lines hauling it in their equipment would have received 85 per cent, the net revenue.

(Testimony of Owen McGuigan.)

Q. The remaining 15 per cent, to whom would it go?

A. It would go to the National Van Lines as the certificate holder.

Q. Did your company authorize Cusack to intervene, to represent your company in any way in negotiating the contract? [34] A. Not at all.

Q. Did you authorize the Von Der Ahe Company to engage the services of Mr. Cusack in this transaction?

A. Not at all. We do not allow agencies to appoint other agents unless with a specific written authority, which was not done in the case of the Von Der Ahe Moving and Storage.

Q. To the best of your knowledge was any written authority given to the defendant Cusack to negotiate or engage in this transaction on behalf of your company or the Von Der Ahe Company?

A. There was no written authority from us as principal to engage his services to represent us.

Mr. Champlin: You may cross examine.

Cross Examination

By Mr. Wegener:

Q. Mr. McGuigan, you stated that your principal, the National Van Lines, has authority to operate in 39 states? A. That is right.

Q. Would you tell the Court the scope of the operations of the non-radial?

A. They are non-radial and extend to every State in the Union with the exception of Utah, Ne-

(Testimony of Owen McGuigan.)

vada, Wyoming, Oregon, Washington, North Dakota, Vermont; and all the other 39 States except those mentioned. We move with unrestricted rights in all the other 39 States. [35]

Q. In other words, your company can pick up shipments—in other words, they can pick up and deliver anywhere between the 39 States?

A. That's right, between points and places in the 39 States.

Q. Do you know whether or not the Van Der Ahe people of St. Louis own carrier rights of their own?

A. I can state positively they do not have an individual operator between the termini in this case nor between Pennsylvania and California.

Q. I did not ask you that question. I asked if they have any authority at all.

A. I am not too sure. If so, it is confined to the Midwestern States.

Q. Are you familiar with the Von Der Ahe application that was filed for an extension with the Interstate Commerce Commission to extend their rights?

A. I have knowledge of their application.

Q. You must have knowledge that the Von Der Ahe people have interstate authority of their own on which to base an extension application?

A. It is not too clear to me what the scope is in regard to it. I do not concern myself with it too much as regional manager.

(Testimony of Owen McGuigan.)

Q. You say the Von Der Ahe people have no authority to [36] appoint sub-agents?

A. That is right.

Q. By what method does your company restrict this privilege?

A. The sales agent agreement under which the Von Der Ahe people operate plainly states they are sales agents and only they are entitled to use the name of this company, its national advertising and reputation, and if they were to create an agency they would have to have it in the form of a rider or a separate agreement which was not done in the case of the Von Der Ahe people.

Q. That would not be the case of the Von Der Ahe people under the I. C. C. authority. In other words, under the I. C. C. authority they could appoint their own agent within the scope of their own authority?

A. Not even within the scope of their own authority, since the National services the same territory and to that extent he is in competition with us. Therefore we could not as a sound business principle give him that authority.

Q. You say you have been engaged since July 6, 1946, as division manager, or in a similar capacity out here with the Van Lines?

A. That is the date of our managership of the Pacific Coast area.

Q. How many years experience do you have?

A. Close to 20 years' experience. Since 1929.

Q. How many years experience do you have in that period? A. Actually close to four years.

(Testimony of Owen McGuigan.)

Q. Before July 5th, 1946?

A. Prior to July 5th, 1946. I spent a three months' training period with the National Van Lines at Chicago. Previous to that I was with the United States Freight Company, in which a lot of my work was involved with household goods movement for about two years.

Q. In pool carrying of household goods?

A. Pool carrying.

Q. The Von Der Ahe Company was your agent which you mentioned was assigned to bring this load to California? A. That's right.

Q. You mentioned they are not privileged to maintain a sub-leasing or agent agreement for you when it comes to the sales end of your business?

A. That's right. We don't allow them to contract on our behalf.

Q. Are you cognizant with the Motor Carriers Act? A. I am.

Q. Does Von Der Ahe have a carrier authority of his own, couldn't he book it on his own authority on the bill of lading with the National Van Lines?

A. Not with the National Van Lines since the National [38] Van Lines has direct service between the termini involved in this case.

Q. Are you familiar with the Allied Van Lines cases which have been before the Commission in the last year?

A. I am not familiar with the Allied setup.

Mr. Champlin: I object to that.

The Court: Objection sustained.

(Testimony of Owen McGuigan.)

By Mr. Wegener: Q. Do you know of any other company augmenting their facilities with this type of equipment?

A. I can speak only with authority of my own company.

Q. Referring to this invoice and also to the copy of the order for services, does that invoice show the same as Mrs. Dambach testified, that the amount paid to the defendant Mr. Cusack was deducted from your freight charges?

A. Apparently that is right. I haven't seen the invoice copy, but I would say this is a duplicate of the same.

Q. Does that state the amount received by Mr. Cusack and acknowledge that the moneys received by him are deducted from the amount of the freight charges?

A. Certainly and properly so. I might enlarge on that.

Q. You have answered.

The Court: You may do so.

A. But since Von Der Ahe had without our knowledge and consent engaged the services of Mr. Cusack, and since he had taken this deposit from the shipper, we felt duty bound to [39] credit the shipper with the money given Cusack, and debit it to the Von Der Ahe account, which was done. Whether or not the Von Der Ahe people recovered from Mr. Cusack I don't know.

Q. Ordinarily what would have been the ordinary procedure as a carrier?

(Testimony of Owen McGuigan.)

A. To refer the shipper to the Better Business Bureau or an attorney to prosecute the matter.

Q. Don't you, before you unload goods, require the consignee to pay all the charges in full before you release the goods? A. Yes, we do.

Q. That \$20.00 was part of the consideration assumed under your tariff in delivering the shipment from between Charleroi and Los Angeles, and you acknowledged the \$20.00 when you delivered the shipment from your possession.

A. We acknowledged it, Von Der Ahe having received it through an unauthorized agent, Mr. Cusack, and we protected the shipper's interest by allowing them to collect themselves from the Von Der Ahe people. What they did from there on was no concern of ours, since they acted unauthorized in accepting his services.

The Court: What do you mean, that you did not make allowance for the \$20.00?

The Witness: Yes, your Honor, we did. We subtracted that amount from the shipper's total charges at the time of [40] delivery.

The Court: You said you collected it from them.

The Witness: We debited their account, which of course was in effect collecting from the Von Der Ahe people.

The Court: You made them pay for that money?

The Witness: Yes.

By Mr. Wegener: Q. Have you had any other occasions, to your knowledge, in the management of the National Van Lines, where deposits may have

(Testimony of Owen McGuigan.)

been taken by someone not the agent of the National Van Lines, and the truck arriving at destination would not acknowledge the money paid to the unauthorized agent?

A. That difficulty has not arisen in my recollection. We try to keep the sales agent within the regulations as to avoid the friction of that type.

Q. In other words, to your knowledge you have never had that experience?

A. I can't recall another case like that at the moment.

Q. One copy of this order is for service, and one copy is the freight bill.

A. Yes, that is the freight bill.

Q. One is a copy of the freight bill. Will you explain the hieroglyphics relating to the defendant Cusack's money?

A. Certainly. Paid. Payment made of \$30.00 on [41] February 28th. Another partial payment was made March 18th, 1947. Of course they paid to Cusack \$30.00 and our Chicago office was instructed to collect from Von Der Ahe and give Mrs. Dambach credit for it.

Q. You instructed your Chicago office to honor the \$30.00?

A. Certainly, as a matter of integrity they had to.

Q. Did you have authority to condone the unlawful act of the sub-agent?

A. As the principal, if the agent was engaged in an unlawful act we would go to any extent to pro-

(Testimony of Owen McGuigan.)

tect the interests of the shipper, which we did in this case.

Q. If you had stayed within the confines of your carrier obligation, you would have demanded that the shipper pay the full \$30.00 plus other charges, then you would have had the shipper go back to Mr. Cusack for the original money?

A. That's right, had not our agent admitted that Von Der Ahe had received that deposit; he was obligated to honor that amount in question.

Q. In other words, you were forced to condone his act.

A. We were forced to condone the act. We said in effect, Mr. Von Der Ahe you as our agent, we haven't authorized you to collect the deposit and we of course prefer that you give it back to the people from whom it was taken.

Q. So actually the money was collected by the Von Der [42] Ahe people, and not by the defendant? A. Collected by the defendant.

Q. Do you know whether or not the defendant gave that money back to the Van Der Ahe people?

Mr. Champlin: That is immaterial, your Honor. The witness just testified that it was to justify the credit. It is a matter between principal and agent.

A. Will you repeat the question?

The Court: You may answer.

A. We have the evidence in the letter of February 6, 1947, from the Von Der Ahe Storage and Van Company that this deposit was included in a

(Testimony of Owen McGuigan.)

check sent by Mr. Cusack to them for \$158.50, which was returned because of insufficient funds.

Q. In other words, the check in that settlement was apparently made by the defendant and your agent, the Von Der Ahe people in St. Louis?

A. There was a relationship there in regard to this deposit.

Q. Would you state whether or not the defendant could roughly bill business for the Von Der Ahe people as a common carrier in and out of their own office?

Mr. Champlin. Objected to as calling for the conclusion of the witness.

The Court: Objection sustained.

By Mr. Wegener: Q. On your trip leasing of vans, what [43] is your company's procedure in this regard.

A. The Von Der Ahe people and people similarly placed will register their order with us as a matter of course, other than for an estimated shipment, and we service it with our own equipment or authorize them to haul it under a subcontract and gave them a lease to do it.

Q. Are those commonly called a trip lease?

A. They are called a trip lease arrangement.

Q. On that trip lease authority is given for the van to travel between the point of origin and the point of destination? A. That's right.

Q. The trip lease authorizes the movement of the van from Charleroi, Pennsylvania, to Los Angeles

(Testimony of Owen McGuigan.)

as a movement of a truck operating under authority of your company? A. Yes.

Q. But the shipments which make up the load are identified by means of the trip manifest which accompanies that trip lease. The trip lease itself does not set forth which shipments comprise the van load but refers to the manifest.

Q. Who makes up the manifest?

A. Those are prepared in Chicago.

Q. Does your Chicago office actually make up the papers or does the agent make up the papers and send copies of them to the Chicago office? [44]

A. Those papers were made out by our Chicago office and are sent to Von Der Ahe. Von Der Ahe completes them once the weight is determined.

Q. Do you have an agency in the State of Colorado? A. Yes.

Q. If the agent in the State of Colorado books a shipment and it moves from Colorado to some point the customer wants it to be moved, your procedure is that he must first communicate with Chicago and then Chicago makes up the papers and sends them back to Colorado before he has authority to ship on the trip lease?

A. Either that or he has his own papers.

Q. Isn't that the usual procedure, in authorizing your agents to do so?

A. Not at all. We don't allow it.

Q. Has there ever been an instance where it has been done.

(Testimony of Owen McGuigan.)

A. I imagine there have been instances but I don't recall any offhand.

Mr. Champlin: I object to that as calling for a conclusion.

The Court. He has answered.

By Mr. Wegener: Q. If the Von Der Ahe people secured this shipment and they had it on their truck moving from Charleroi to Los Angeles, on their bill of lading they show [45] the National Van Lines as the common carrier from that point on to destination, to the best of your knowledge would that be a transaction that commonly occurs in the moving business?

A. That would be a very uncommon occurrence. It would in effect allow competition in the territory which we ourselves serve.

Q. Does your agency contract with the Von Der Ahe people specifically prohibit it?

A. It does not prohibit it, but they are not given indiscriminate right to make the lease trips. The National Van Lines would not permit any agent to haul within our territory for a segment of the through haul.

Q. You paid a sales commission to the Van Der Ahe people as agent of the National Van Lines?

A. I would say so.

Mr. Wegener: I have no further questions.

Redirect Examination

By Mr. Champlin:

Q. Did you authorize or ratify, in the true sense of the word, this transaction Mr. McGuigan, on be-

(Testimony of Owen McGuigan.)

half of the National Van Lines? Did you ratify the transaction in which the defendant Cusack collected commission?

A. No, I did not ratify it at all. I don't know who originated the order.

Q. In other words, the commission you paid was a [46] commission you were obligated to pay under your contract with the Von Der Ahe people?

A. Yes.

Q. So far as you were concerned you never recognized Mr. Cusack either as an employee or as an agent? A. That's right.

Mr. Champlin: That is all.

LOUIS NAULT,

a witness called by and on behalf of the Government, having been first duly sworn, testified as follows:

The Clerk: What is your name?

The Witness: Louis Nault.

The Court: What count is this?

Mr. Champlin: Count III.

Direct Examination

By Mr. Champlin:

Q. Where do you live at present, Mr. Nault?

A. Long Beach.

Q. Did you live there on or about September 4, 1946? A. Yes, I did.

Q. What is your occupation?

A. I am a boiler maker.

Q. Do you know the defendant in this case, Mr. Clem J. Cusack? A. Yes. [47]

(Testimony of Louis Nault.)

Q. Did you have any transaction with him on or about the fourth of September, 1946.

A. Yes, I did.

Q. Tell the jury what that transaction was or what it consisted of.

A. I had some furniture to move from Fremont, Nebraska, so I contacted this telephone number in the Long Beach newspaper, and they told me they couldn't get hold of him, but that he would call me up in about two hours, which he did, and he stated that he would come out to the house, which he did.

Q. What conversation took place?

A. I asked him about moving the furniture, how soon I could get it, and he said he could get it out in not less than 30 days.

I asked him how much we would have to pay and he said \$100.00.

Q. Did you pay him \$100.00?

A. I went to the bank and drew \$100.00 and gave it to him that day.

Q. Did you receive a receipt? Did you receive some contract or paper, which he signed in your presence, a receipt for the \$100.00 that you paid him?

A. I believe I have it. I am not sure.

Q. Was it a yellow paper? [48]

A. It was a yellow paper similar to this. I mislaid it somehow; I don't have it with me.

Q. Was the furniture or the household goods you had in Fremont, Nebraska, moved to California by the defendant?

A. They were moved by another line.

(Testimony of Louis Nault.)

Q. Which line was that?

A. The National Lines.

Q. Was that the same as the National Van Lines?

A. Or the Van Der Ahe. I have got the receipt for the National Lines.

Q. Did you see the trucks when they arrived?

A. Yes.

Q. Did you notice the name on the trucks at the time?

A. It was Van Der Ahe. I know it was now.

Q. That is the same company that has been referred to in the previous testimony, is that right?

A. I guess it is, yes.

Q. Did you pay the rest of the bill, or were there any other charges besides the \$100.00 which you paid?

A. When the truck came with the furniture I paid the balance which was \$310.00.

Q. That's in addition to the \$100.00 paid?

A. They deducted the \$100.00. The furniture was to be delivered in 30 days. It came three months and a half later.

Q. I don't understand the answer [49]

A. It was delivered three and one-half months later instead of 30 days. When I tried to contact Mr. Cusack I could not get hold of him. The phone answered and said they found out that he was not on the up and up and they discontinued his service in Long Beach.

Mr. Champlin: You may cross examine.

(Testimony of Louis Nault.)

Cross Examination

By Mr. Wegener:

Q. Mr. Nault, you just made the statement that you tried to contact him and you found out that he was not on the up and up?

A. That's what the lady over the telephone told me, sir.

Q. The lady on the telephone told you that?

A. Yes, that's right, the number I called from.

Q. What number did you call?

A. I can't recall but I think I can get it.

Q. Are the facts clear in your mind as to exactly what happened relating to the telephone conversation and the conversation which you did have with the defendant? A. Yes, I called this number up.

Q. In your conversation, when you talked to him on the telephone, did you make any inquiry of the answering party on the telephone as to who he represented as agent or carrier of an agent?

A. No, it had the Lincoln Van & Storage Company when [50] I called this number but she said she would get in touch with him, that he was not there at the time, but that he would come out and see me, and two hours after he came out to the house.

Q. The Van Der Ahe people you stated delivered the goods, is that correct? A. I think that is right.

Q. Did you have any conversation with these people at all? A. No.

Q. In other words, you had nothing to do with the Van Der Ahe people actually picking up your goods?

A. He sent me a telegram one night and told me

(Testimony of Louis Nault.)

that my furniture would not be released or would not be here from Fremont, Nebraska. So I phoned back my daughter that night and told her to check them, and she wired back and said nobody was there to call for the furniture and I wired her right back and told her not to let the furniture go until the Van Company came after it, and she answered she certainly would not. When the Van Company came to get it they looked okay, so they let the furniture come on out.

Q. The \$100.00 that you gave the defendant when the shipment was delivered, did you have to pay the full amount of the bill?

A. That \$100.00 was deducted.

Q. The actual transaction was that you called the [51] Lincoln people and then through the Lincoln Transfer Company your goods were picked up in Fremont, Nebraska, and brought to California?

A. Yes.

Q. Did you not call any outside company, as the other witness testified, and cancel the order and obtain someone else to handle the shipment?

A. No, I went to the Interstate Commerce office and I went to the Better Business Bureau at Long Beach and to the Police Department and they called Mr. Cusack and told him what to do. He got busy.

Q. You say you were at the Interstate Commerce Commission office? A. That's right.

Q. Did you ask him for advice how to proceed?

A. No, but I wanted to find out what could be done in that kind of a transaction.

(Testimony of Louis Nault.)

Q. Did you know that your shipment was under the purview of the Motor Carriers' Act? Was that the reason you went to the office of the Interstate Commerce Commission?

A. That would be a reason, yes.

Q. If you knew that your shipment was under the Interstate Commerce Act, and you had been properly advised why didn't you investigate the Lincoln Transfer and Storage Company first? [52]

Mr. Champlin: I object to that as argumentative.

The Court: Objection sustained. This is not a private lawsuit by this man against someone. This is a suit by the Government of the United States, and the mere fact that he may have known the man was violating the law does not make any difference. He is not seeking to recover money for something he did not get. He says that his goods were transported. This is a simple lawsuit, and the only question is, was this man authorized to act as an agent for somebody else? If so, all right; he is not guilty of any offense. If he was not, then he was a broker who had no license and he is guilty. It is a very simple action. The thing that makes it complex is that there are ten transactions.

Q. Then to review all the testimony which you have given, would you say that a simple statement of the facts that you have presented is, that you called the Lincoln Transfer and that you gave him \$100.00 deposit; that the Von Der Ahe people undertook to deliver the goods to California and collected the difference between the \$100.00 of the freight charges,

(Testimony of Louis Nault.)

and you paid the balance upon the delivery by the Von Der Ahe people? A. I did that, yes.

The Court: Any redirect?

Mr. Champlin: No redirect examination.

The Court: Step down. Call you next witness.

(Witness excused.) [53]

Mr. Champlin: The Government will call Mr. McGuigan.

OWEN McGUIGAN

a witness recalled by and on behalf of the Government, having been previously duly sworn, testified further as follows:

Direct Examination

By Mr. Champlin:

Q. Mr. McGuigan, did you bring with you certain papers in connection with the Louis Nault shipment to California by the Von Der Ahe people of St. Louis? A. Yes, sir.

Q. In this particular transaction, the contract made September 4th, 1946, with Mr. Nault.—is this transaction similar to the other one you testified to concerning the shipment to Mrs. Dambach?

A. I believe it is identical.

Q. Will you explain what your company had to do with this shipment to Mr. Nault?

A. This was another case where our company received this request from Von Der Ahe to service this shipment, as one of their own orders, and consequently we are authorized to do so, a trip lease evi-

(Testimony of Owen McGuigan.)

dently to make a pickup, as part of our van load, and assign it for westward movement.

Q. On whose bill of lading was this shipment of goods shipped?

A. This was picked up by Von Der Ahe according to my [54] papers, on January 14, 1947, and a bill of lading was issued by the National Van Lines out of the office at 2431 Irving Park Road, Chicago.

Q. Did your company in this case authorize the defendant Cusack to make any engagements or contracts or agreements to transport goods over either your lines directly or your agent's line, Von Der Ahe Company of St. Louis?

A. No, this was regarded as an outright transaction between Von Der Ahe and the National Van Lines.

Q. Von Der Ahe in this case would be acting in the scope of their authority, is that correct, in carrying on this transaction as your agent?

A. If they had themselves arranged this transportation; but they are not authorized or empowered to accept orders from another agent or somebody's agent, without our specific authority to do so.

Q. Did your company authorize the defendant Cusack in this case, in the Nault shipment, to take the order or make any contracts on behalf of your company or accept any money on behalf of your company? A. Not at all.

Q. Do you have the bill of lading with you?

A. I do, and the settlement sheet that you requested

(Testimony of Owen McGuigan.)

Q. These are part of the official records of your company, is that correct? [55]

A. That is right.

Q. For the time being are you custodian of those papers?

A. Yes. That is the bill of lading.

Q. I would like to have it marked for identification.

The Clerk: Plaintiff's Exhibit 4 for identification.

Mr. Champlin: The Government offers exhibit for identification No. 4 into evidence.

The Court: Admitted.

The Clerk: Four in evidence.

By Mr. Champlin: Q. I would like to ask one more question, Mr. McGuigan, on the relationship of a company like the Von Der Ahe in this case: Do you have any leasing agreement with them in which under your authority for interstate transportation you can lease their trucks to haul any shipment such as this one from Nebraska to California?

A. Yes, we do that occasionally.

Q. To the best of your knowledge was that the situation in this case?

A. Yes, I am sure the Von Der Ahe Company moved under a bona fide trip lease.

Q. It would travel under your shipping?

A. Under the National Van Lines all the way.

Mr. Champlin: That is all. [56]

(Testimony of Owen McGuigan.)

Cross Examination

By Mr. Wegener:

Q. That copy of the bill of lading, marked Plaintiff's Exhibit No. 4 on the bill of lading, I would like, if you will, to review this just a moment. In this second section where it says "Consigned to" and "Delivering carrier," in the space provided for "Delivering carrier" whose name is there?

A. Unless one wanted to be technical I should say the National Van Lines, unless another carrier is involved.

Q. The question is whose name appears there as the delivering carrier? A. It is left blank.

Q. On the freight bill,—the settlement sheet with the Von Der Ahe people it shows there apparently where moneys were collected by the delivering carrier which was Von Der Ahe on his van, and you have charged him with full amount of the invoice.

A. That is right.

Q. Then you have credited Von Der Ahe back with 85 per cent of the transportation revenue, which apparently is his discount which he earned for hauling the shipment out here. A. That's right.

Q. The note at the bottom says "Subject to correction." Just what does that mean? [57]

A. That means this: As I told Mr. Nault before he came on the stand there has been an error in weight on this shipment of \$87.44 which he will get. In other words, authority is made to make the refund to Mr. Nault as soon as I secure his new address which I have.

(Testimony of Owen McGuigan.)

Q. What is the nature of the offset which resulted in \$87.00 refund?

A. In the correct tabulation of the weight by the Von Der Ahe people, evidently they collected final charges in cash, which was why they are charged with the entire collection. They withheld it.

Q. Did the Von Der Ahe people have a certified weight slip from the public weighmaster on delivery of the goods covering the freight charge?

Mr. Champlin: I object to that as calling for the conclusion of the witness.

The Court: What is the question?

(Question read by the reporter.)

The Court: I will sustain the objection. It is not material.

Mr. Wegener: Your Honor, under the regulations of the Interstate Commerce Commission there must be a certified slip accompanying it.

The Court: We are not interested in that. He has admitted they made a mistake. Mr. Nault is the gainer by the [58] refund which he has coming.

Mr. Wegener: The point I am trying to arrive at, your Honor, is that the witness previously has testified to the exactness and accuracy in which he conducted the operations of their business. Now we desire to discover why they have erroneous weight slips.

The Court. He is not on trial. It does not go to his credibility. All I am interested in it whether this man had authority to represent these people as

(Testimony of Owen McGuigan.)

agent and employee. We are not interested in their method of doing business.

Mr. Wegener: The method has a great deal to do, your Honor, with whether or not there is a brokerage act involved.

The Court: This has nothing to do with that as to whether they got good weight or bad weight.

Mr. Wegener: What I am trying to arrive at is whether or not Von Der Ahe began shipment at the point of origin under his own authority.

The Court: You are not asking that. Objection sustained.

By Mr. Wegener: Q. On this bill of lading the name National Van Lines, Inc., appears.

A. I can't say whether this bill of lading was made up by Von Der Ahe of St. Louis or ourselves at Chicago. There are no initials on this bill. Otherwise I can't state positively just who made it up, when and where.

Q. It is your company's procedure that unless you [59] initial the document you are not certain who is the one who made up the instrument?

A. It is our practice, wherever and whenever we can get people to do it to 100 per cent initial all documents concerned with our movement so we will know who made errors, when made, or who has prepared the papers.

Q. So someone either in the Chicago office neglected to do so, or it was made up by Von Der Ahe and he neglected to do so?

(Testimony of Owen McGuigan.)

A. Von Der Ahe may have made it up and neglected to do it. It is just company procedure in the office.

Mr. Wegener: That is all.

Redirect Examination

By Mr. Champlin:

Q. Do the Von Der Ahe people have authority from the Interstate Commerce to haul on their own authority from this point in Nebraska to California?

A. I can state definitely they do not have authority to operate between points in Nebraska and California.

Mr. Champlin: That is all.

At this time we would like to have marked for identification two documents I believe Government's exhibits for identification 5 and 6.

The Clerk: Government's Exhibit 5 and Government's Exhibit 6 for identification. [60]

Mr. Champlin: At this time the Government offers in evidence two documents which purport to be certificates and statements from the Secretary of the Interstate Commerce Commission, Washington, D. C., which are submitted under Rule 27 of the new Criminal Rules of Procedure which incorporates by reference Rule 44(b) of the Civil Rules, which states that a certificate of a negative nature may be submitted by the proper custodian.

The Clerk: Plaintiff's Exhibits 5 and 6 admitted in evidence.

Mr. Champlin: At this time the Government suggests that the Court read these two documents to the jury.

The Court: You may read them later on. I merely volunteered to do that reading because it is not customary to have the witness read them. So long as there is no witness on the stand you may interrupt the proceedings to read the documents. I will let you read 5 and 6. Do you want both?

Mr. Champlin: If the Court please, I would like to read both at this point because they pertain to all the counts in the information and pertain to the whole case.

The Court: You don't need to read the Notary's certificate. Merely state it was verified by a Notary, giving her name.

Mr. Champlin: Exhibit No. 5 is a certificate and statement as follows: [61]

"I, W. P. Bartel, do hereby certify that I am Secretary of the Interstate Commerce Commission and as such have in the District of Columbia the custody of all records of certification of public convenience and necessity and permits issued to common and contract carriers by motor vehicle, and of all applications therefor, and of all other documents filed with said Commission pertaining to said applications, and of all records pertaining to temporary authorizations issued to common and contract carriers by motor vehicle, pursuant to the provisions of the Interstate Commerce Act (49 U. S. Code, Secs. 5, 306, 307, 309, 310a, and 312 (b)) and pursuant to the orders, rules and regulations

promulgated thereunder (49 C.F.R., Secs. 179.0-179.6, 180.1, 180.50, and 215.1-215.4); and that after diligent search no certificate of public convenience and necessity, per, it, or temporary authority issued to Clem J. Cusack, defendant herein, and no application for authority of the above-specified tenor filed by or on behalf of said defendant has been found on file and no record of the filing of any such document has been found to exist in my said office.

“In Witness Whereof, I have hereunto set my hand and affixed the seal of the Interstate Commerce Commission on this 12th day of April, 1948.”

Certified by Lillian L. Cooley, a Notary Public in and [62] for the District of Columbia.

Exhibit No. 6 states as follows:

“I, W. P. Bartel, do hereby certify and state that I am Secretary of the Interstate Commerce Commission, and as such have in the District of Columbia the custody of all records of licenses issued to brokers of transportation by motor vehicle, and of all applications therefor, and of all other documents filed with said Commission pertaining to said applications pursuant to the provisions of the Interstate Commerce Act (49 U. S. Code, Sec. 311. (a)), and pursuant to the orders, rules, and regulations promulgated thereunder (49 C.F.R. Cum. Supp. 7.5, 6 F. R. 2523); and that after diligent search no license issued to Clem J. Cusack, the defendant herein, and no application for license of the above-specified tenor filed by or on behalf of

said Clem J. Cusack has been found on file and no record of the filing of any such document has been found to exist in my said office.

“In Witness Whereof, I have hereunto set my hand and affixed the seal of the Interstate Commerce Commission on this 23rd day of January, 1948.”

Signed by

W. P. BARTEL,

Secretary Interstate

Commerce Commission.

The certificate again is signed by a Notary Public, Lillian L. Cooley, Notary Public in and for the District of [63] Columbia.

MRS. J. H. OLIVER,

a witness called by and on behalf of the Government, having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

A. Mrs. J. H. Oliver.

The Clerk: What is your first name?

A. Irene.

Direct Examination

By Mr. Champlin:

Q. What is your residence, Mrs. Oliver?

A. It is in Los Angeles. Do you want the address?

Q. Yes, if you please.

A. 7526 South Brighton.

Q. What is your occupation?

A. I am a housewife.

(Testimony of Mrs. J. H. Oliver.)

Q. I direct your attention to the approximate date of June 13, 1947. This pertains to Count I, if the Court please. Did you have an occasion to see or talk to the defendant Cusack at that time?

A. Yes.

Q. Will you state in general what your conversation was and what you talked to him about on that day?

A. Well, I called him up, from the ad. I saw in the paper, that I looked in; I saw one ad in there that I thought [64] was a reliable company. I called him up, and I have called up a couple of other transfer people, and some of them did not go south into San Antonio. So I got this man and he said he would be right out, and he came out, to estimate the load. Then he came in the house and I talked it over with him. He said he would have to have a deposit of approximately one-third of the weight, if I wanted to have a reservation on a truck that would be going out within a few days; and this was the way I received space in the truck.

Q. Did he require you to pay some money at that time?

A. Yes. We gave him \$45.00. He estimated the load at about 2,000 pounds.

Q. Where were the household goods at that time?

A. They were in our garage at this address.

Q. That is in Los Angeles? A. Yes.

Q. Where was it you desired them to be shipped to? A. To San Antonio, Texas.

(Testimony of Mrs. J. H. Oliver.)

Q. Did he represent any particular company he worked for?

A. He said he was the **Lincoln Transfer Company**.

Q. Did he transport or arrange or cause to be transported your household goods to **San Antonio, Texas**?

A. Yes, after about six weeks.

Q. Did you see any trucks or vans come to your house [65] to pick up the goods?

A. Yes, about, I think it was the 9th of July, he called up that there would be someone come out and pick up the freight. My husband asked him if the freight was going right out. He said as soon as the truck was loaded. So a big truck came up and picked up the furniture. It was a Von der Ahe—I don't remember the name.

Q. To refresh your memory, was it Von der Ahe Company, St. Louis?

A. Yes.

Q. Did they transport your goods directly to San Antonio then?

A. The freight did not arrive, and did not arrive, and I had been writing back and forth to my son all this time. So it was around the last of the month Mr. Cusack called up and said, "Your freight is in transit and should be there on Monday." So when my son's freight arrived at San Antonio they asked this driver where it had been and he said, "Why, I came right straight through. I picked this stuff up in the basement of some apartment house."

(Testimony of Mrs. J. H. Oliver.)

Q. Did you have it stored in your home in the basement? A. No, it was in our garage.

Q. Did you authorize anybody to store it in transit?

A. No, we absolutely did not, we asked especially to leave it right there until it was ready to go out of town— [66] leave it right at our garage.

Q. Did you pay the full freight bill?

A. No, that was paid in San Antonio.

Q. But you did pay some \$45.00?

A. \$45.00.

Q. Did he sign any paper or anything that purported to be a contract at the time you paid the money? A. Yes, he did.

Q. You don't happen to have that with you, do you? A. It is here some place.

Q. Is this the paper that you saw the defendant sign his name to in your presence at the time he took your money and gave you the papers?

A. Yes.

Q. Was it a yellow piece of paper similar to this?

A. Yes, it was. And at that time he said, "Well, we will have to send you a certified copy of the weight," and we never had a certified copy of the weight yet. And when we got in touch with him about the insurance there was no way of getting in contact with him and he ignored letters.

Q. Did he represent to you at the time that he was taking these orders or making contracts for

(Testimony of Mrs. J. H. Oliver.)

any other company other than the Lincoln Van & Storage?

A. No, he did not. He said he had trucks going in a short time and would see that everything was all right. [67]

Q. Was there any explanation by him of why the Von der Ahe Company got them rather than the Lincoln Storage Company? A. No.

Mr. Champlin: Cross examine.

Cross Examination

By Mr. Wegener:

Q. When the shipment was delivered in San Antonio was the amount of money paid to the defendant here in Los Angeles deducted from the amount of the bill? A. Yes, it was.

Q. When you first talked with the defendant, just what was your conversation? Did you ask him how he could move your furniture to San Antonio? Just tell us what you can.

A. I called and asked him if he shipped down to that part of the country and what his rates were. He said yes. I asked him how soon he thought he could get it shipped. He said it wouldn't be very long because he had trucks going out every day.

Q. Did you call other companies other than the defendants? Didn't you call any other company to find out what kind of service they could give or the rate they could charge?

A. I called other companies, yes, and they said they shipped straight through to Chicago and did not go down in that direction. Some of them said they could transfer the freight. This man said he

(Testimony of Mrs. J. H. Oliver.)

shipped it right through and [68] could take care of it in a few days.

Q. In your conversation with the various companies you did not ask them particularly, or you did not know particularly just how they could consummate the transaction? You were just interested in having the furniture moved from Los Angeles to San Antonio? A. Yes, to my son.

Q. You say the truck that loaded the goods at your garage was, to the best of your knowledge, a Von Der Ahe truck? A. Of St. Louis, yes.

Mr. Wegener: No further questions.

Redirect Examination

By Mr. Champlin:

Q. I would like to ask you if this is the statement or paper given to you at the time you paid the \$45.00, Mrs. Oliver? A. Yes, that is.

Mr. Champlin: I would like to have that marked Government's Exhibit for identification No. 7.

The Court: It may be so marked.

The Clerk: Government's Exhibit 7 for identification.

Mr. Champlin: The Government offers in evidence Government's Exhibit for identification No. 7.

The Clerk: Is it admitted, your Honor?

The Court: It may be received. [69]

The Clerk: Seven in evidence.

Q. By Mr. Champlin: Counsel asked you on cross examination if you saw any other advertisement or where you saw the advertisement as to which you contacted Mr. Cusack?

(Testimony of Mrs. J. H. Oliver.)

Examiner, and one in the telephone book. There was a large ad in the phone book.

Q. Was this the type of telephone book that you saw the first one in? A. Yes.

Q. Would you recognize the same ad if you saw it, if you saw it in the book?

A. Yes, there were two Lincolns. One was the Transfer and one was the Van and Storage.

Q. I will ask you if this is the same ad you saw in the telephone book?

A. Yes, and that is the same number.

Mr. Champlin: I would like to have this marked for identification as the defendant's advertisement in the book.

The Clerk: Merely the page?

Mr. Champlin: Page 118 of the classified ads.

The Clerk: Shall I detach the page?

The Court: I think you had better detach it.

The Clerk: This is Plaintiff's Exhibit 8 for identification. [70]

Mr. Champlin: If the Court please, I would like to hold this ad temporarily before offering it in evidence until I can obtain the book proper. This is October, 1947. This was earlier than that.

The Court: I don't think you need another book. The witness has testified that it looked like the one she saw.

Mr. Champlin: She said it was the same ad.

The Court: You may rely on her statement.

Mr. Champlin: In that case I would like to offer it in evidence.

(Testimony of Mrs. J. H. Oliver.)

Mr. Wegener: Your Honor, I object to entering this into evidence. It would not be very difficult to get the proper book to show the ad she may have seen at the time this shipment was made. This was a subsequent ad. The ads were changed by the company and the schedules as the books came out. This came out in October, 1947, and the offense charged was committed in June, 1947.

The Court: The witness, however, states that this was like the ad she saw. If you want to contradict it, you may secure a copy of the other book.

Mr. Wegener: The book in existence at the time I thought would be more proper. So far as I know it will be apparently the same ad.

The Court: Counsel has offered to produce it. I think he is entitled to have this offered on the witness' statement [71] that she saw a similar ad on the same page. I will overrule the objection. If the Government wants to produce additional proof it is up to counsel. However, he is entitled to have that in now on the showing he has made.

The Clerk: Plaintiff's Exhibit 8 in evidence.

The Court: The question is not what ad she answered. The question is **what was done** afterward, after she talked with the defendant.

Mr. Champlin: That is all.

Recross Examination

By Mr. Wegener:

Q. Mrs. Witness, in the advertisement that you see there, under the name "Lincoln Transfer &

(Testimony of Mrs. J. H. Oliver.)

Storage Co." would you read what the ad says underneath the name?

A. "Agent 601 South Vermont Ave."

Q. That's right. Then it states the telephone number, "Drexel 5297." A. Yes.

Q. Under the name it shows "Agent". In other words, the ad itself by virtue of the wording, when you saw the book you also saw the word—

Mr. Champlin: I object to that as calling for the conclusion of the witness. She is not capable of answering whether he was the agent or not.

The Court: It is an argument. The ad speaks for [72] itself.

Q. By Mr. Wegener: When you talked with the defendant did you ask him any questions as to whether or not he was acting as agent for anybody else? A. No, I did not.

Q. You just called and placed an order to move the goods from Los Angeles to San Antonio?

A. When he answered the phone he said this was the Lincoln Transfer Company.

Mr. Wegener: That is all.

(After admonishing the jury, the Court here took a short recess.)

(Short recess.)

The Court: Let the record show the jury is in the box and the defendant in Court with his counsel.

MARIE GERMANN,

a witness called by and on behalf of the Government, having been first duly sworn, testified as follows:

The Clerk: Your name, please?

The Witness: Marie Germann.

Direct Examination

By Mr. Champlin:

Q. Where do you live, Mr. Germann?

A. Now?

Q. Yes. [73]

A. 1714 East 55th, Long Beach.

Q. What is your occupation?

A. Housewife.

Q. I direct your attention to February 26, 1947, where were you living at that time?

A. 5029 Walnut.

Q. Long Beach? A. Yes, Long Beach.

Q. Did you, on or about that date, have occasion to meet and talk to Mr. Cusack, the defendant?

A. I did, yes.

Q. What was the occasion for it? How did you happen to meet him?

A. There was an ad run in the Press Telegram, and it said to check for return rates on loads or something to that effect. We thought we could save a little money and call that number, a Long Beach number 32107. The man on the phone said yes they would have somebody out, and they were out in an hour. It was Mr. Cusack. He comes in. He looks

(Testimony of Marie Germann.)

our place over and said sure he would ship our furniture. I said, "Are you the Lincoln Van & Storage?" He said he was not. He said he was not affiliated with the one in Seattle. He was truthful in that. Anyway, he said he could take our stuff any day we would call him. So I called. He sent a nondescript van out which had no name on it at all. He took the [74] \$50.00 from us.

Q. Where was it you desired the household goods be shipped? A. Seattle.

Q. Seattle, Washington? A. Yes.

Q. You asked him if he was affiliated with some company in Seattle? A. Yes.

Q. And the name of that company?

A. The Lincoln Van & Storage.

Q. Do you know what company the defendant represented himself to be?

A. He said he was the Lincoln Van & Storage in Los Angeles.

Q. He said he was affiliated with the Seattle people?

A. No. I asked him that and he said he was not.

Q. Did he transfer your goods to Seattle?

A. No, he did not. He took the money. He went away. Then I called him and said our goods were ready and he sent a van—at least a van came. It had no name on it. It came to the house and took the goods away. Then he called me on the phone, or I called him, and he said, "I will keep your goods in storage because you have no use for them right away." [75]

(Testimony of Marie Germann.)

I said, "I want my goods right away."

He said, "I can send them as soon as you want them." He did not send them as soon as I wanted them. It cost me a lot of money calling up on the phone. And finally the Red Ball brought the goods there.

Q. They were hauled to Seattle by the Red Ball?
A. Yes.

Q. Is that a van and storage line?

A. Yes.

Q. Did he tell you at the time he was talking to you that he was working for the Red Ball Company?

A. No, he was for himself; that he had his own vans. He told us he had his own vans.

Q. I will ask you if this is the paper that he signed in your presence at the time you gave him the \$50.00?

A. Yes, that's right. He specified \$10.00 for insurance. When the goods came they claimed there was absolutely no insurance on our goods whatsoever.

Q. Did you see him sign it there?

A. Yes. He signed it and then he told me he did not know why he signed it but he did. There is a letter there regarding the \$50.00.

The Clerk: Government's Exhibit 9 for identification.

Mr. Champlin: I forgot to mention that this witness is testifying in connection with Count IX of the indictment. [76]

(Testimony of Marie Germann.)

I will offer in evidence Government's Exhibit 9 marked for identification. I now offer it in evidence.

The Clerk: Is it admitted, your Honor?

The Court: Yes.

The Clerk: Nine in evidence.

Q. By Mr. Champlin: The \$50.00, do you have a receipt or any checks, or anything of that kind, as a receipt for the \$50.00 you paid?

A. No, only the yellow paper; he put that on there. The Red Ball carrier did not want to give me credit for that \$50.00 at all. I said, "You are going to give me credit for that," so he finally called up the transfer people, and we finally, I guess, got credit for it. I am not sure what we did get out of that \$50.00.

Mr. Champlin: That is all. You may cross examine.

Cross Examination

By Mr. Wegener:

Q. Mrs. Germann, when you called the defendant on the phone did you ask any questions of him as to whether or not he had any operating authority of his own?

A. He did not speak to me. I just called, and I talked to somebody there, and they said they would send him out. When he came I questioned him very closely. He did not say. He said he had his own vans. Definitely he told my husband and brother that; he said he had his own van lines.

(Testimony of Marie Germann.)

Q. Did you ask him whether or not he was operating as agent for another van line?

A. No, I did not, because he told us he had his vans, the Lincoln van.

Q. You mentioned a charge of \$10.00.

A. That's right.

Q. For insurance? A. That's right.

Q. Do you have a copy of the freight bill that was given to you at destination in Seattle?

A. No, I don't. I believe the man gave it to me, but I think we lost it, but I believe it could be gotten very readily from the Red Ball line in Hollywood.

Q. Was the charge for \$10.00 added onto your freight bill?

A. I don't know; I can't tell you. There was so much confusion at the time of it I don't know.

Mr. Champlin: Let the record show that we furnished the defendant's counsel with a copy of the freight bill he just asked the witness about, in this shipment. It is a photostatic copy and so authenticated.

By Mr. Wegener:

Q. Will you look at that photostatic copy? Do you recognize that as being a photostatic copy of the original? A. Yes, that certainly is.

Q. On the extension of these charges that appear in [78] the freight bill, is there a charge set out for any additional insurance, namely, the \$10 you referred to?

(Testimony of Marie Germann.)

A. No. I questioned the carrier about that here. He said there was no additional insurance on her stuff at all.

Q. But likewise the charge for it does not appear in the freight bill?

A. No, it does not seem to appear here, no.

Q. The amount you paid the defendant, does that show as a deduction?

A. No, it shows \$50.00.

Q. That was the amount you paid the Lincoln Transfer at Los Angeles?

A. That's the amount I paid to Cusack.

Q. In other words, it was taken off of the amount of the freight charges?

A. Yes, but the company did not get that.

Mr. Wegener: That is all.

Mr. Champlin: If the Court please, we would like to introduce into evidence this for identification.

The Clerk: Government's Exhibit 10 for identification.

Mr. Champlin: Inasmuch as counsel has shown it to the witness who has identified it, may we now offer it in evidence?

The Court: Yes.

The Clerk: Is it admitted in evidence, your Honor? [79]

The Court: Yes.

The Clerk: No. 10 in evidence.

Mr. Champlin: That is all.

MARIE KOCH,

a witness called by and on behalf of the Government, having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Mrs. Marie Koch.

Mr. Champlin: If the Court please, this witness will testify concerning Count No. VIII.

Direct Examination

By Mr. Champlin:

Q. Where do you reside?

A. 9231, Loman Avenue, South Gate.

Q. That is in Los Angeles County?

A. Yes.

Q. Your occupation is that of a housewife, is that right? A. Yes, sir.

Q. Have you lived there very long, at that address? A. Since last August.

Q. 1947? A. Yes, sir.

Q. Where did you live in February, 1947?

A. At 3011 East Lawrence, Huntington Park.

Q. On or about February 21, 1947 did you see the defendant Clem J. Cusack?

A. It was July of 1946.

Q. What transpired at that time in connection with Mr. Cusack?

A. Well, we called him to get some information about having our furniture moved here.

Q. Where was your furniture at that time?

A. Covington.

(Testimony of Marie Koch.)

Q. What arrangements were made with Mr. Cusack concerning the movement of your furniture?

A. He was to pick it up in about a month. They got it on August 5th.

Q. 1947?

A. No, 1946. And we got it sometime the latter part of September.

Q. 1946? A. Yes, sir.

Q. Did you pay Mr. Cusack any money at the time you made the arrangement or agreement?

A. Yes, sir, \$85.00.

Q. Did he sign any contract, any papers or agreement at the time? A. Yes, sir.

Q. Did he sign anything in your presence, that is, Mr. [81] Cusack? A. Yes, sir.

Q. Did he deliver the goods according to the contract, or did you receive them from some other company?

A. We received it from the Richardson Transfer Company, Solina, Kansas.

Q. At the time you first contacted him did he state what his connection was with the Richardson Company, if any?

A. No, when we called the Lincoln Transfer Company we understood it would come through the Lincoln Transfer Company, not the Richardson.

Q. Did he say it would be some other line or carrier or did he indicate to you how it would be delivered?

(Testimony of Marie Koch.)

A. No, he said it was his own trucks that brought it through.

Q. What date was it that your furniture was received?

A. It was the latter part of September.

Q. September, 1946, is that it?

Q. At the time you made the contract there was nothing said as who would actually deliver it, is that right?

A. No, sir, we were under the impression that the Lincoln Transfer Company would pick it up.

Q. How did you happen to make the contract with Mr. Cusack and the Lincoln Company?

A. From the telephone directory. [82]

Q. Do you see an advertisement in this book that directed you to them?

A. Yes, sir, it was in the classified section.

Mr. Champlin: Cross examine.

Cross Examination

By Mr. Wegener:

Q. Did you state that your furniture was moved from Covington, Kentucky to California?

A. Yes, sir.

Q. Was the truck that delivered your shipment in Los Angeles, was it the Richardson Transfer & Storage Company? A. Yes.

Q. Did the driver have any difficulty at all when he arrived with your goods, to make delivery?

A. He did.

Q. Just what was the nature of the difficulty?

(Testimony of Marie Koch.)

A. They did not want to give us credit for the \$85.00 and we couldn't contact Mr. Cusack. It took all day. Finally we got results from the Interstate Commerce Commission.

Q. What kind of results?

A. That evening Mr. Cusack sent us our money with a messenger, but we couldn't get him all day. Our furniture arrived that morning at 7:00 o'clock.

Q. That was \$85.00 you spoke of which you had given [83] him previously? A. That's right.

Q. Then after the \$85.00 was sent up there by a messenger, was the money given to you or was it given to the driver of the truck?

A. It was given to my sister.

Q. Then your sister used that \$85.00 with other money to pay the Richardson driver the amount of the freight bill?

A. Yes. He wouldn't give us the furniture until we gave him the full amount.

Q. You mentioned before that when you talked with Mr. Cusack first you asked him if he was going to handle that in his own truck?

A. That's right, we wanted a through van. We did not want it handled twice.

Q. Did you ask him in particular as to the truck, whether it was going to be his own truck from Los Angeles or a truck from some other carrier, or something, that would come into Covington?

A. No, sir, he told us he had trucks that went through, took loads from here back there and would

(Testimony of Marie Koch.)

pick up our load and bring it out. That was the understanding.

Q. Did you arrange for the Richardson people to handle your shipment out here?

A. No, sir, I did not, I did not. [84]

Q. In other words, after you gave him the order the goods were delivered to you here in Los Angeles?

A. Yes, sir.

Q. Do you have a copy of the papers that the Richardson driver gave you when the goods were delivered to you here?

A. Yes, I have.

Q. May I see them, please? Are these the only papers the Richardson people gave you when they delivered the shipment to you?

A. Yes, they are the only papers I have.

Q. There is only a freight bill and a copy of a warehouse receipt. I thought you might have a copy of the bill of lading.

A. That is the bill of lading underneath.

Q. This is the freight bill.

A. There is the bill of lading.

Q. This is a warehouse receipt.

A. That is all I have, then. There is the weight.

Q. Was your shipment picked up and placed in storage anywhere in transit?

A. In Solina, Kansas, yes.

Q. Was it picked up at your request or did the carrier pick it up for your convenience?

A. It was picked up as soon as they got there with it. We did not know they were coming from Kansas then. [85]

(Testimony of Marie Koch.)

Q. In other words you thought, when the goods were loaded in Los Angeles they would come to you then? A. That's right.

Q. This states that they placed the goods in storage under your direction. A. No.

Q. The goods according to the warehouse receipt, no storage in transit was authorized by you in the movement of the goods? A. No, sir.

Q. Will you read the heading of the freight bill where it says: Richardson Transfer Storage Company, if you please.

A. Coast to coast van service. Richardson Transfer Storage Company. Coast to coast van service, 246 North 5th North 5th Street, Solina, Kansas, Post Office Box 329, Form No. 3.

Mr. Champlin: If the Court please, there was a correction to be made. This relates to Count V instead of Count VIII.

The Court: All right.

Redirect Examination

By Mr. Champlin:

Q. You were asked on cross examination, Mrs. Koch, about this \$85.00 and some difficulty you had here as to the delivery after your furniture arrived, is that correct? [86]

A. That is correct.

Q. What transpired? Tell all the details that took place when the furniture actually got here.

A. They arrived with it at 7:00 o'clock in the morning. We thought they would take off the \$85.00 which they had received.

(Testimony of Marie Koch.)

Q. You refer to the \$85.00 you had paid to Mr. Cusack? A. That's right.

Q. Go ahead.

A. We tried to get in touch with Mr. Cusack so we could get the furniture unloaded. We couldn't get him, and they wouldn't let us have the furniture until we got the money.

Q. The \$85.00?

A. Yes. That evening they sent it up with a messenger and they unloaded our furniture.

Q. Who sent the \$85.00? Give us the details of what took place.

A. He sent it up with a colored man.

Q. You mean Mr. Cusack?

A. Mr. Cusack, to my sister.

Q. What is her name?

A. Mrs. Glen Rice.

Q. What time was that?

A. About 5:00 o'clock in the evening.

Q. The furniture arrived at 7:00 o'clock in the [87] morning?

A. In the morning, and stayed there all day.

Q. After this \$85.00 arrived by the colored messenger, then what happened?

A. Then they unloaded our furniture.

Q. By "they", you mean the Richardson Van Company?

A. The Richardson Van Company unloaded our furniture then.

Q. The original contract you signed, I will ask you if this is the paper that you received at the time you paid the \$85.00 in the first place?

(Testimony of Marie Koch.)

A. Yes, sir.

Q. Does Mr. Cusack's signature appear thereon anywhere? A. Yes, sir, here and here.

Mr. Champlin: Let the record show **that** the witness has indicated two places. I would like to have this marked for identification as Government's exhibit.

The Clerk: Government's Exhibit 11 for identification.

Mr. Champlin: I now offer in evidence the Government's Exhibit No. 11, having been previously marked for identification.

The Clerk: Is this admitted, your Honor?

The Court: Yes.

The Clerk: Government's Exhibit 11 in evidence

Mr. Champlin: That is all. [88]

Recross Examination

By Mr. Wegener:

Q. Do you know whether or not your sister or someone in Covington, Kentucky—do you know of your own knowledge whether or not they placed any order with another van line back East?

A. No, sir, they did not. No one had anything to do with it except me.

Q. No one had anything to do with placing the order but you? A. No, sir.

Mr. Wegener: That is all.

BERTHA JOHNSTON,

a witness called by and on behalf of the Government, having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Bertha Johnston.

Direct Examination

By Mr. Champlin:

Q. If the Court please, this testimony relates to Count No. VIII.

Where do you live, Mrs. Johnston?

A. 310 West Broadway.

Q. Whereabouts is that?

A. In Long Beach. [89]

Q. How long have you lived there?

A. About two years and a half, I guess, or three.

Q. Your occupation is that of a housewife, is that right? A. I am alone and I keep house.

Q. Did you live there on February 21, 1947?

A. Yes, sir.

Q. Did you have occasion to see the defendant Cusack at that time? A. How is that?

Q. On or about February 21st, 1947, did you have occasion to see Mr. Cusack?

A. That is the day that I made the transaction with Mr. Cusack.

Q. What was that transaction? Tell the jury.

A. I paid him \$50.00 to bring the furniture of my daughter's from Hibbing, Minnesota, and he phoned to her after we had had our talk and made

(Testimony of Bertha Johnston.)

arrangements and told me that they would get the furniture either the 28th of February, or the following day, and he told my daughter to say it would be not later than March 10th that the furniture would be in Long Beach.

Q. Did he deliver the furniture in Long Beach as agreed?

A. No. We waited and waited and finally I called him [90] to see what the trouble was and he said it was on account of the blockades of the snow, that they could not get through.

Q. Who told you that, that the road was blockaded by snow? Did Mr. Cusack tell you that?

A. What?

Q. That they were blockaded by snow. Who told you that? A. He did.

Q. Do you mean Mr. Cusack?

A. Yes. Then a few days later—no, it was several days later I called up again to see what the trouble was and he said, "They tell me the roads are good; that has nothing to do with the roads." He says, "It is the company back there."

Q. Did he ever deliver your furniture to you?

A. No.

Q. Who delivered it, if anyone?

A. It was a man in Hibbing, but it put my daughter back like everything, because she had given up her apartment, and the boss or owner re-rented it for a lot more, and she had to pay whatever it cost during that time; it was plenty.

Q. At the time you first talked to Mr. Cusack

(Testimony of Bertha Johnston.)

did you pay him any money as a part of the agreement?

A. I gave him a \$50.00 check, and I have the check here.

Mr. Champlin: (To the Clerk): Will you mark this for [91] identification, No. 12, I believe.

The Clerk: Government's Exhibit 12 for identification.

Mr. Champlin: I would like to offer in evidence No. 12 previously marked for identification as Government's Exhibit 12.

The Clerk: Is it admitted, your Honor?

The Court: It may be received.

The Clerk: Twelve in evidence.

Q. By Mr. Champlin: You testified Mr. Cusack failed to deliver your furniture? Did you ever receive a refund for the check you gave him?

A. I finally did. He sent me a check, but it came back no funds. I sent it in again, and it came back, no funds. Then I took it up with the Better Business Bureau, and the bank, and they advised me to write a letter, which I did, and he sent me the money.

Q. Did you sign any contract or paper at the time you say Mr. Cusack signed the paper, at the time of the original agreement?

A. I think I signed the paper he made out. I couldn't just find it. Maybe when the fellow came I gave it to the F.B.I. man. I don't remember, but it was just a plain slip of paper.

Q. You don't have any evidence of a contract?

(Testimony of Bertha Johnston.)

A. No, I have not. The only thing I have is a paper. [92] The F.B.I. came out and talked to me, and he saw the check returned that was no good. I suppose I have a copy of that too.

Mr. Champlin: That is all. You may cross examine.

Cross Examination

By Mr. Wegener:

Q. Do I understand you properly that you placed an order with Mr. Cusack and then later cancelled the order with **him**?

A. Yes, because he did not bring my goods. He did not keep his word.

Q. Then you wrote your daughter, and someone else placed the order with some other company?

A. Yes. It cost her three or four times that amount, paying for that after giving up her apartment, and he kept stalling and promising he would get it.

Q. Do you remember who your daughter had, or whoever it was, pick up the furniture?

A. It was a man in Hibbing.

Q. Do you have any copy of any papers of the shipment?

A. No, she kept all the copies of this. She was living in Long Beach.

Q. Was the check, that is, the money which you paid the defendant, that was eventually returned to you? [93]

A. He paid me back, which was before we ever made any deal with the other fellow.

(Testimony of Bertha Johnston.)

Mr. Wegener: That is all.

Mr. Champlin: No further questions, your Honor. I would like to call one more witness.

CHARLES LESTER,

a witness called by and on behalf of the Government, having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Charles Lester.

Direct Examination

By Mr. Champlin:

Q. What is your occupation, Mr. Lester?

A. I own the Belmont Van & Storage Company, Long Beach.

Q. You live in Long Beach, do you?

A. That is correct.

Q. Did you have occasion to have a transaction with Mr. Cusack in connection with removing some furniture? A. I did.

Q. What date was that, approximately?

A. It was five incidents, starting, I believe, June 13th, and ending June 29th, 1946.

Q. What arrangements did you have with Mr. Cusack—your company, what arrangements did you have so far as the [94] delivery of the goods was concerned?

A. None whatsoever. It wasn't in connection with interstate commerce. I mean by that for transportation in interstate commerce. It was simply a

(Testimony of Charles Lester.)

local hauling and storage we thought we were getting into.

Mr. Champlin: If the Court please, this testimony relates to Count X of the information.

Q. Did your company have anything to do, on or about June 22nd, 1946, in connection with the delivery of goods for Mr. Paul Reese, from Long Beach, California, to Belgrade, Montana?

A. It was June 22nd that we picked up the goods, on telephone instructions from Mr. Cusack, that he had made his own arrangements, and the truck simply wasn't available; that the customer had to have his goods picked up on this specific date, and it was specifically understood it was a local cartage to my warehouse and storage.

Q. How long were the goods kept in your storehouse before they were subsequently moved to Montana?

A. They picked them up at my warehouse on September 14th.

Q. They were stored there between June 22nd and September 14th? A. That is correct.

Q. Do you know anything about the transaction directly, [95] as to what company moved them from your warehouse to Montana? A. Yes.

Q. What company was that?

A. The United Van Lines.

Q. Does your company have any business relationship, direct business relationship with the United Van Lines? A. Yes, we are an agent.

(Testimony of Charles Lester.)

Q. Was Mr. Cusack an agent for you, or anything of that kind? A. He was not.

Q. Did your company give him authority to make contracts, or make any transactions that would relate to you or the United Van Lines, to your knowledge? A. Absolutely none.

Q. If you know, do you know whether or not Mr. Cusack was a representative of the United Van Lines, or that he had any authority to act for them as your principal? A. No, he does not.

Q. You do know of your own knowledge that he does not?

A. There are only two agents in the area. That is the main office of the United Van Lines in Los Angeles and myself in Long Beach. **Since that time** I believe there were three other agents in Los Angeles, but Mr. Cusack was not one of them.

Q. Did Mr. Cusack make any arrangements with you to [96] pick this furniture up and move it to your warehouse on or about the 22nd of June?

A. He called me on the telephone.

Q. What was your conversation? What did he say and what did you say at that time, going back, I believe, to the 13th, the first of the five conversations?

A. He called me, and I did not know him. I do know several Lincoln Transfers. I did not know who he was, but it is customary for the transfer people to work together if we can. He called me and asked me about picking the goods up. I told him what the situation was, that it was strictly

(Testimony of Charles Lester.)

local; and that same attitude prevailed through the five conversations. At the end of that time it became quite evident that things weren't working out the way they should, and we conveniently had no time to pick up any further shipments. There were one or two more conversations.

Q. Did your company happen to have authority in interstate commerce to move in interstate commerce?

A. Not the Belmont Van & Storage.

Q. As agent for the United Van & Storage, you can make contracts within your authority for them? A. That's right.

Q. But in this case, as I understand your testimony, you made the arrangements to have this furniture picked up for one Paul Reese, and stored it in your warehouse. Do you know how it happened to be moved by the United Van Lines? [97]

A. Yes, I do.

Q. What is the story on that?

A. This Paul Reese shipment was the last they unloaded from the warehouse. On the others I believe there was some little difficulty of getting our charges. This particular one was supposed to be received on August 9th. I talked to Mr. Cusack on August 8th, and there was a balance of \$38.00, I believe, due for our storage and hauling charge. I told him we would have to have the money before we could release it. He promised me that the money would be there in cash with the driver the next morning. The driver showed up with no money, so I called

(Testimony of Charles Lester.)

Mr. Cusack and told him what the situation was. He sent a Western Union money order for \$38.00. The driver was somewhat disgruntled about what happened and he left, but he did receive the money. The driver was gone and the people were calling the local representative. I was very anxious to get the whole thing off my neck, so I talked with Mr. Cusack and I have a letter of authority, which says to make arrangements to forward it by United Van Lines; and I completed the papers with the charges, and sent them to Mr. Cusack, with the letter and requested that a copy be signed and returned to us. It was listed as the **Lincoln Transfer, as shipper**. That was the way it was signed.

Q. You don't happen to have the letter?

A. I have the letter in Mr. Cusack's writing [98] authorizing us to make the arrangements, and I have the order and I believe that you have a copy of our letter to Mr. Cusack.

Mr. Champlin: May we have this marked for identification. If you need that for your official records, we can request the Court to release that at some later time.

The Court: All right.

A. This is our letter to him.

The Clerk: That is Government's Exhibit 13 marked for **identification**.

Mr. Champlin: I offer Government's Exhibit No. 13 for identification into evidence.

The Clerk: Is it admitted, your Honor?

The Court: It may be received.

(Testimony of Charles Lester.)

The Clerk: Thirteen in evidence.

Q. By Mr. Champlin: Mr. Lester, do you know of your own personal knowledge how much Mr. Cusack got out of this transaction in the way of a commission or fee?

A. He only collected \$50.00. It was credited to him.

Q. He was credited by your company or credited by the United Van Lines? How was that done?

A. One or the other. He had collected the \$50.00 and we showed the charges for the pickup and storage. On the order they credited that back, the \$50.00 that we knew Mr. Cusack had collected, and he paid us our advance charges. So actually he paid out \$38.00 and sent it to us for these [99] charges. He had collected \$50.00.

Q. You don't know who he collected the \$50.00 from, do you? A. No, I don't.

Q. That was the Paul Reese shipment—you know that to be a fact? A. Yes, that's right.

Mr. Champlin: You may cross examine.

Cross Examination

By Mr. Wegener:

Q. I will show you what is called an Order for Services. Will you look at that, please? Did you make up that Order for Services? A. I did.

Q. Was that Order for Services made up after the goods were brought into your warehouse at Long Beach? A. That's right.

Q. In discussing the facts and figures that are on this Order for Services, up in this corner what

(Testimony of Charles Lester.)

does that state? Does it say: Agent Belmont Van & Storage Company? A. That is right.

Q. In the freight bill charges, does that show a charge to the customer for picking up and bringing it to your warehouse in the amount of \$34.80?

A. That is correct.

Q. After all the charges were computed, the \$50.00 which was paid to the Lincoln Transfer was deducted from the full amount of the freight bill, is that correct, and the shipment was signed for by Lincoln Transfer & Storage Company as shipper by Mr. Cusack as manager? A. That is correct.

Q. This letter that you wrote to Mr. Cusack, a copy of which is in evidence, refers to this Order for Services that you sent to him, is that correct?

A. That is correct.

Q. Would you read the first paragraph?

A. Enclosed is the original and two copies—

Mr. Champlin: If the Court please, does the Court allow the witness to read it into evidence?

The Court: No. Just call it to his attention and ask him the question.

Q. By Mr. Wegener: I call your attention to the first paragraph. Does the first paragraph there refer to the \$50.00 that shows on your freight bill as a deposit made by the defendant?

A. No, the first paragraph refers to the charges to be collected from the customer and also the \$50.00 made as a deposit.

Q. In other words, it refers to the deposit? [101]

A. It does refer to the deposit, yes.

(Testimony of Charles Lester.)

Q. You made a statement that the United Van Lines hauled this shipment from your warehouse at Long Beach to destination? A. Yes.

Q. You also stated that you were agent for the United Van Lines at that time, is that correct?

A. That is correct.

Q. You also stated that Mr. Cusack had no authority to book shipments through your authority as agent for the United Van Lines?

A. He had no authority to book shipments as an agent of the United Van Lines.

Q. As a subagent, through your agency?

A. He has no arrangement.

Q. Tell me this: When that shipment was delivered to destination, and the freight bill and bill of lading were sent to the United Van Lines home office, who was given credit for the booking commission accruing on that particular shipment?

A. I was.

Q. Did the United Van Lines charge your account with the \$50.00 which showed as a prepayment? A. Yes.

Q. Did you and the defendant make any settlement as to that \$50.00 that was on the freight bill?

A. He paid me the \$38.00 advance charges. That brought [102] it down to the \$11.00 figure.

Q. On this freight bill, what does the second line refer to, this charge here?

A. That was for the local hauling, on an hourly basis, to our warehouse, and the storage. I don't have the exact date on that, but it was from the

(Testimony of Charles Lester.)

date of picking up, which was January 22nd, to August 22nd, the local hauling.

Q. Who does it show that the money on the freight bill is due for that charge?

A. It shows it is due the Lincoln Transfer.

Q. It shows that money, \$34.80, is due the Lincoln Transfer?

A. Yes, because the Lincoln Transfer paid me that money.

Q. On this Order for Services it shows the Lincoln Transfer & Storage Company as the shipper; it also shows less deposit paid to Lincoln Transfer & Storage Company as the amount of money that was collected by them. Can you reconcile the facts of those two—how they came to exist on this order?

A. Yes, I think so. It was the understanding that the Lincoln was acting as agent for the customer.

Q. How could he act as agent for the customer and yet take the \$50.00 amount off the freight bill?

Mr. Champlin: I object to that as calling for a conclusion. [103]

The Court: That is argumentative and calls for the conclusion of the witness.

Q. By Mr. Wegener: Would you say he could be shipper and agent both?

Mr. Champlin: The same objection.

The Court: Objection sustained.

Q. By Mr. Wegener: Did the owner of the goods, Paul Reese—I believe he is the owner of

(Testimony of Charles Lester.)

the goods—did he in any way enter into any agreements or anything with you to have his shipment moved from your warehouse to destination?

A. He did not.

Q. In other words, he had no contract whatsoever with the owner of the goods?

A. That's right.

Q. And the goods were picked up from the residence to your warehouse under Mr. Cusack's instructions?

A. That is correct, and stored to the account of the Lincoln Transfer.

Q. When the goods went from the warehouse to destination you had to ship through the United Van Lines from your warehouse to destination?

A. That's right.

Q. You were paid a commission by the carrier for booking the shipment? [104]

A. That is right.

Q. The carrier in return charged you back with \$50.00, you say, and that you had received the \$50.00?

A. We had received the greater amount of it; all with the exception of \$11.00.

Mr. Wegener: That is all.

Mr. Champlin: No further questions.

The Court: All right. Have you any further witnesses tomorrow, or have you rested?

Mr. Champlin: That is all, your Honor, for today. Do you wish me to call any further witnesses?

The Court: Are there any further witnesses for tomorrow?

Mr. Champlin: I don't believe so, except in rebuttal.

The Court: I want to know if you rest.

Mr. Champlin: We rest.

The Court: I will excuse the jury at the present time. I want to discuss the matter with counsel.

Ladies and gentlemen, I am about to excuse you until tomorrow morning at 10:00 o'clock. The Court admonishes you not to converse among yourselves or with anyone else on any subject connected with the trial or form or express an opinion thereon until the case is finally submitted to you. You may withdraw from the court room. When you come in, go up to the jury room and we will call you when we are ready.

Let the record show that the following proceedings were [105] had outside of the presence of the jury: I merely excused the jury so in case you desire to make any motion you may make it at the present time so we will not lose any time in the morning.

It is not our custom to send the jury out late in the afternoon, so I don't see any reason why the case should not go to the jury tomorrow afternoon. I have been working on the instructions. Being a newcomer you probably do not understand our custom here, especially mine. I have accumulated over a long period of years instructions covering practically every type of case, both civil and criminal. However, of course, counsel have the right to present and request further instructions and I will examine them, and if I see one that I have not covered

I will have them rewritten on our own paper, so if they are sent to the jury they will not speculate as to the origin of the instructions.

The instructions are prepared without notes, or any indication by whom they are submitted. The instructions asked for by the Government, for instance, relate to the particular offense, and a definition of the offense on the part of the defendant, I will give any instructions relating to the particular defense which he has raised. The other instructions are general instructions relating to the doctrine of reasonable doubt, the presumption of innocence and the credibility of witnesses and the like, and they have been covered [106] by my own general instructions which have stood the tests of many, many appeals before the Circuit Court of this District, because I have tried criminal cases in five out of the seven States of this District, and in both Districts, Northern and Southern California.

We will stand adjourned until tomorrow morning at 10:00 o'clock.

(Whereupon an adjournment was taken until Wednesday, April 21, 1948, at 10:00 o'clock a.m.)

Los Angeles, California, Wednesday, April 21,
1948, 10:00 a.m.

The Court: The cause on trial.

The Clerk: 19898 Criminal, the United States versus Clem J. Cusack.

The Court: Let the record show that the jury is in the box and the defendant is in Court with his counsel. Proceed.

Mr. Wegener: Your Honor, I move the Court to dismiss the charge—

The Court: Just a minute. I asked you yesterday if you were going to make a motion. That motion cannot be made in the presence of the jury.

Mr. Wegener: I understood counsel for the plaintiff had no further witnesses for yesterday.

The Court: No, he said he rested, and I excused the jury and I stated for the record— Let us read the record so there will be no misunderstanding.

(Record read by the reporter.)

The Court: They had rested and I asked you if you wanted to make a motion. However, I will let you make it now.

Ladies and gentlemen of the jury, you will be excused while counsel make the motion, with which you are not concerned. Will it be stipulated that the usual admonition has been given?

Mr. Champlin: Yes. [108]

Mr. Wegener: Yes, your Honor.

The Court: All right.

Mr. Wegener: May it please the Court, the defendant moves that Count No. II of the information be dismissed, inasmuch as no testimony was offered in support of that count.

The Court: I am sorry, but there is no longer a motion to dismiss. It is called a motion to acquit.

Mr. Wegener: Motion to acquit, your Honor. There is no testimony given in the case.

Mr. Champlin: If the Court please, the Government concurs in that motion. We will ask to make it ourselves, to acquit him on Count II. We will submit no instruction on that count.

The Court: The motion will be granted as to Count II.

Mr. Wegener: The defendant makes a motion on Count I for an acquittal, on the basis that no compensation was proved to have been received by the defendant. The testimony relating to the count shows that the money was received by the defendant as a prepayment of the freight charges on behalf of the carrier, and the carrier gave credit for the sums received by the defendant. There is no evidence offered by the plaintiff to the effect that the carrier who provided that transportation paid any compensation whatsoever to the defendant. It is admitted on the stand that the amount of money and also the receipt for the money given, which was [109] introduced in evidence, shows the amount as prepaid on the shipment, and if the Court please, the amount of money which the carrier duly accounts for, he is entitled to under the tariff charges. There is no testimony to the contrary, that the charges so collected were not his lawful tariff charges. That the acts of an agent or subagent, accruing under such act of transportation, must be proven by the carrier himself through testimony as to what he, as a carrier, paid to any person who might be unlawfully operating as a broker.

Your Honor as to Count I that will be all the motion.

The Court: The motion should be made as to all the counts. The answer to your argument is this: That is the count charged in the language of the statute; so it may be proved either by actual

receipt of the money or by arrangements by holding one's half out. That is the language of the statute. The Government has so pleaded, and you not having asked for a **Bill of Particulars as to the matter** which ties the Government down to what they are going to prove, the Government may prove either. Section 311(a) reads:

“No person shall for compensation sell or offer for sale transportation subject to this chapter or shall make any contract, agreement, or arrangement to provide, procure, furnish, or arrange for such transportation or shall hold himself or itself out by advertisement, solicitation, or otherwise as one who sells. provides, [] contracts, or arranges for such transportation, unless such person holds a broker's license issued by the Commission to engage in such transactions.”

Then follows the exception so, in answer to your argument, under the federal practice an offense may be charged in the language of the statute, and where the section penalizes any one of several acts, the Government can allege all, and prove one, and that is how the indictment here is drawn.

Mr. Wegener: Your Honor, under the indictment or information there is no negation of the exception. In a case recently decided, *United States of America vs. English*, decided by the Circuit Court of Appeals of this Circuit, reported in 139 Federal 2d 885, decided January 7, 1944, the question was before the Court on a motion to quash, because the exceptions were not negated in the information. The Court upheld in that case the mo-

tion to quash, because the exceptions of Section 306, Subdivision (a), Title 49 U. S. Code, are so much a part of the statute, the operating clause made it so much a part, and they were bound together with the offense defined, similar to the offense defined in Section 311(a) of the Act, that the essential ingredients of the prosecution cannot be adequately described without a negation of that in the information.

The Court: Section 306 is an entirely different thing. [110-A] That relates to a motor carrier, and to one operating who needs a certificate of convenience, and the same reasoning would not apply to a broker.

Mr. Wegener: A broker, under Section 311(a) is a person who for compensation sells or offers for sale transportation, subject to the Transportation Act, or holds himself out and receives compensation, who might represent two carriers in the same territory, receiving compensation for issuing the business of those carriers with similar authority in the same territory, and come under the purview of the brokerage section of the Act. However, any broker can be a bona fide agent of a carrier without filing under Section 311(a), which might put him under the purview of a broker. The Act says itself:

“And provided further, That the provisions of this paragraph shall not apply to any carrier holding a certificate or a permit under the provisions of this chapter to any bona fide employee or agent of such motor carrier, so far as concerns trans-

portation to be furnished wholly by such carrier or jointly with other motor carriers holding like certificates or permits, or a common carrier by railroad, express, or water."

The Court: That is all right, but that is an exception, provides that certain persons engaged in certain transportation between June 1st, 1935 and October 1st, 1935, were [110-B] excluded. In other words, this Act was known as the Act of 1937, and only persons who were engaged in business at a certain time came within the Act. Therefore, the statute having provided for that, it was necessary to say as to persons who were not registered subsequent to that time. But this particular case has no time limit. It merely says anybody who is a broker, and who is engaged in interstate commerce, must have a license. Incidentally, if the reasoning of another court does not appeal to me, I am not bound to follow another District than my own. You understand that?

Mr. Wegener: Yes.

The Court: If it applied to this it would appeal to me, but it does not, to say that any person whose cause of action has arisen after January 1st must bring it within a year, from that date, or within a year after the effective date of the Act, which was August 2nd, 1946, because it creates a right as of a certain date. The complaint must allege that the right started within that period. That is in Section 306, but it is not true as to Section 311, because there is no exception stated. It does not say that a person engaged in the brokerage busi-

ness prior to that time shall be excepted. It merely says an employee employed, when? At the time they were soliciting. That is defensive matter; not a matter of substantive pleading, which the Government must plead in this case. And, furthermore, the proof here shows conclusively, [110-C] so far as a prima facie case can show, that this man at no time had a permit. And, furthermore, that he did not have any relation of agent or employee to the carrier who transported the goods. It may be well that the evidence will show to the contrary.

Mr. Wegener: The testimony further shows that the acts of the agent or subagent, in all counts before the Court—that the defendant was acting as an agent for various carriers, either through an express conversation or an agent's contract with them, or through an implied contract. The evidence shows that each of the carriers condoned the actions of the defendant by deducting the amount from the freight bill.

The Court: You can't ratify a criminal act by the mere fact that they said they felt in honor bound to deduct it in such cases. In two cases the goods had not been transported by him or anybody else, and the money was returned. This is not a civil action, and there is no such thing as a ratification of a criminal act by anybody but the Government. The mere fact that they accepted it did not make him their agent at the time. He was still operating without a license, and if they named him their agent at the time the difficulty arose they could not retroject it into the past in order to ren-

der valid his agency and legalize his act. That is not a ground for a verdict of acquittal in this case.

Mr. Wegener: Furthermore the testimony shows that the [110-D] transactions were handled principally through the Von Der Ahe Company of St. Louis. The Von Der Ahe Company of St. Louis is a carrier in its own right.

The Court: That is not the evidence. You can't refer to facts not in the record. The motion must be made on what the evidence shows.

Mr. Wegener: I believe the witness McGuigan testified in effect that he knew the Von Der Ahe people had that authority. Someone had authority.

The Court: I cannot go outside of the record. It is a question up to the jury as to whether he did it in one capacity or another.

Mr. Wegener: Those are all of the motions the defendant wishes to make at this time.

The Court: I understand your motion applies to all the other counts, on the same ground?

Mr. Wegener: Yes, your Honor.

The Court: The motion is granted as to No. II and denied as to the others. You may bring the jury down.

Let the record show that the defendant is in court with his counsel, and the jury in the box.

CLEM J. CUSACK,

the defendant, called as a witness in his own behalf, having been first duly sworn, testified as follows:

The Clerk: Your name, please?

The Witness: Clem J. Cusack.

Direct Examination

By Mr. Wegener:

Q. State to the Court your address.

A. 201 South Berendo.

Q. Mr. Cusack, on or about June 22nd, 1946, did you book a shipment for one Paul Reese, that is, contract to move goods from Long Beach, California, to Belgrade, Montana? A. Yes.

Q. Did you receive a deposit from the shipper in the amount of \$50.00? A. Yes, sir.

Q. Would you explain to the Court the substance of this particular transaction that took place?

A. Well, these people called up in the nature of an inquiry asking for an estimate in moving up to Belgrade, Montana. I went out to their home, inspected their furniture, and gave an estimate and received \$50.00 deposit and gave them a contract on it.

Q. Mr. Cusack, prior to this date, June 22nd, 1946, [110-F] were you engaged in local moving, as a salesman for any company, prior to that time?

A. Yes, sir.

Q. Will you give to the Court and jury the experience and background and so forth that you

(Testimony of Clem J. Cusack.)

may have had prior to that date in the moving industry.

A. I have been in the industry since 1936, and I have worked with various carriers in the major cities of the country. [111]

Q. Since 1936? A. Yes.

Q. In the companies beginning 1936, were you engaged both as an employee or as an agent? Just what was your relationship? A. Agent.

Q. As an agent of the carriers?

A. That's right.

Q. On this particular date, June 22nd, 1946, on the Paul Reese shipment—is that the date the contract was signed or is that the date the shipment moved?

A. The date the contract was signed.

Q. Approximately how long after that was the shipment moved, to the best of your recollection?

A. September, I would say.

Q. Before June 22nd, and after June 22nd—first let us answer the question before June 22nd, when the order was signed, had you talked with any one of the carriers authorized to serve the territory between the points of Los Angeles and the State of Montana? A. Yes.

Q. With whom did you talk? A. Ford.

Q. Where is Ford's domicile?

A. Twin Falls, Idaho. [112]

Q. Does Ford have a certificate to transport as a common carrier between those two points?

A. Yes, he does.

(Testimony of Clem J. Cusack.)

Q. And the shipment that is in question, to Paul Reese, you booked this shipment as an agent of the Ford Vans? A. Yes, sir.

Q. Were you his agent for any other carrier?

Mr. Champlin: I object to that, your Honor. The witness cannot testify legally as to the scope of his agency.

The Court: That's right. You may state the understanding you had. He cannot state whether he was the agent or not. That is a question of fact to be determined by the jury.

Q. By Mr. Wegener: Did you have any agreement with any other carrier that had the same authority between Los Angeles and Montana?

A. No, sir.

Mr. Champlin: Same objection, your Honor.

Mr. Wegener: I am asking him if he was the agent for any other carrier.

Mr. Champlin: It still calls for the conclusion of the witness.

The Court: He has answered that he had no agreement.

Q. By Mr. Wegener: Through the arrangement that you had with the Ford Van Lines, what authority did you have as to providing transportation services for Paul Reese in your [113] relationship with Ford?

A. I contacted Ford. He sent a truck down to the warehouse and loaded the furniture. There was some misunderstanding between the warehouse and the driver. The driver drove away without the furniture.

(Testimony of Clem J. Cusack.)

Q. Is that the misunderstanding that the witness Lester of the Belmont Storage, referred to in his testimony yesterday, of the driver getting disgusted and driving away? A. Yes.

Q. So the Ford Van Lines truck drove away from the Belmont warehouse? A. Yes.

Q. After the Ford Van Lines truck drove away from the warehouse, what part did you play in the handling of the shipment from that point? Did you have any further transactions with the customer relating to the movement of the household goods?

A. No, I did not have with the shipper. Mr. Lester said he would handle it through United, so I washed my hands of the whole thing.

Q. Mr. Lester handled it through the United, to the best of your knowledge, and demanded the return of the money from you?

A. That's right.

Q. How much money did you return to Mr. Lester? [114]

A. I believe it was in the neighborhood of \$38.00.

Q. Had any charges accrued on that shipment, before the United Van Lines hauled the shipment from his warehouse to Montana?

A. Yes, that amount had accrued on it.

Q. Did you have any connection whatsoever with the United Van Lines in regard to that transportation? A. No, sir.

Mr. Wegener: If the Court please, I would like the record to show that the testimony as given is

(Testimony of Clem J. Cusack.)

as to Count X. I will make the witness available to counsel for the plaintiff on the count and will proceed to these various counts.

The Court: We do not start the cross examination until the matter is completed.

Mr. Wegener: I thought it would clarify the record to have the testimony as to each of the counts.

The Court: We don't do that. We never do that way.

Q. By Mr. Wegener: On or about February 26th, 1947 did you enter into any arrangement or contract to move a shipment of household goods from Long Beach, California to Seattle, Washington? A. Yes

Q. Was the shipper's name or party with whom you dealt Marie Germann? A. Yes. [115]

Q. You received a check from her in the amount of \$50.00? A. Yes.

Q. Will you explain to the Court the transaction which took place on this particular shipment?

A. Mrs. Germann called the office for an estimate on moving up to Seattle. I went out and inspected the furniture and gave her an estimate, and gave her a contract, and collected \$50.00.

Q. And the \$50.00, to the best of your knowledge, was deducted from the freight bill at destination? A. Yes, it was.

Q. Had you had any conversation with anyone relating to the carriage of this particular shipment? A. At what time?

(Testimony of Clem J. Cusack.)

Q. At the time the shipment actually moved between this point and the State of Washington.

A. Yes.

Q. With whom?

A. With the Red Ball Moving & Storage at North Hollywood.

Q. Is that the Red Ball at Hollywood, California? A. North Hollywood.

Q. Is the Red Ball of Hollywood, a carrier in its own right, to the best of your knowledge? [116]

A. I believe they have rights in California only.

Q. Interstate or intrastate?

A. Inrastate.

Q. But nothing outside of the State of California? A. No.

Q. Does the Red Ball agency operate through any other carrier?

A. They are agents for the North American Van Lines in that territory.

Q. To the best of your knowledge does the North American have a license to operate between Los Angeles and the State of Washington?

A. They have.

Q. At the time this shipment was handled, on February 26, 1947, were you an agent, or did you have any relationship with any other carrier between Los Angeles and the State of Washington?

A. No, sir.

Q. You had no arrangement with any other carrier other than what arrangement you may have had with the Red Ball people?

(Testimony of Clem J. Cusack.)

A. That is right.

Q. On or about February 21, 1947 did you enter into any arrangement with a Mrs. Edmond O'Neil, to move household goods from Hibbing, Minnesota, to Long Beach, California? [117]

A. An arrangement was made with Mrs. Johnston.

Q. In other words, Mrs. Johnston acted on behalf of Mrs. O'Neil for this shipment?

A. That's right.

Q. In the handling of this shipment did you have any arrangement or any connection with any carrier to service this shipment? A. Yes, sir.

Q. With whom did you have such arrangement?

A. With Von Der Ahe, St. Louis.

Q. Is Von Der Ahe of St. Louis an agent of any other national carrier, to the best of your knowledge?

A. Yes, at that time I believe he was working on National permit.

Q. National who?

A. The National Van Lines.

Q. Is that a Chicago company? A. Yes.

Q. Is that the company Mr. McGuigan testified he was an officer of yesterday? A. Yes, sir.

Q. Tell the Court what was the arrangement with the Von Der Ahe people in St. Louis.

A. I was acting as their agent.

Q. How did you first contact the Von Der Ahe people? [118] A. By telephone.

Mr. Wegener: If the Court please, I would like to introduce that as Defendant's Exhibit 1.

(Testimony of Clem J. Cusack.)

The Clerk: Defendant's Exhibit A for identification.

Q. By Mr. Wegener: In your conversation with the Von Der Ahe people, will you relate the conversation which you had with them on the telephone?

A. Well, I would say in the middle of 1946 I talked with their drivers and with Mr. Von Der Ahe himself, as to acting as their agent here. In the meantime I booked some business, which I asked them to haul, but I said I would like to have something in writing that was legal before they loaded up the shipment, and he sent that telegram.

Mr. Champlin: I object. There is no evidence that the Von Der Ahe people shipped anything themselves. Therefore, any relationship with them is irrelevant and immaterial.

Mr. Wegener: It is quite material in the case. There is sufficient evidence from Mr. McGuigan's testimony of his own knowledge that the Von Der Ahe people had authority, and they were agents for the National Van Lines who also had a larger scope of operational authority.

The Court: The objection to the last question will be sustained. And the answer so far as it goes will be stricken out.

Q. By Mr. Wegener: In the furtherance of your business [119] do you ordinarily receive telephone calls? A. Yes.

Q. Do you ordinarily make telephone calls?

A. Yes, sir.

(Testimony of Clem J. Cusack.)

Q. The telephone is an important part of your business? A. Yes.

Q. Do you have many occasions to write letters and send and receive telegrams? A. Yes.

Q. Will you look at that telegram and state to the Court and jury just how you happened to come into possession of that telegram.

A. I have been in conversation with the Von Der Ahe people for several months prior to this date, which was December 17, 1946. He told me on the phone that I could look business for him in California—

Mr. Champlin: I object to that as hearsay— what they told him over the telephone.

A. Our arrangement was—

The Court: I will overrule the objection.

The Witness: Will you read the question back?

(Question read by the reporter.)

A. He would handle it and I could act as his agent. So before we loaded any of these shipments, we decided we should have something in writing to confirm our agreement. [120] Consequently on December 17, 1946, he sent me this wire giving me authority to be his agent in California.

Q. By Mr. Wegener: Would you read the contents of the wire to the Court, please?

A. The wire is to the Lincoln Transfer & Storage Co. Attention C. J. Cusack—

Mr. Champlin: I object to the witness reading this.

(Testimony of Clem J. Cusack.)

The Court: It may be offered in evidence and if counsel desires to read it he can do so when the witness is off the stand.

Mr. Wegener: The defendant moves that this be admitted in evidence.

Mr. Champlin: May I ask the witness just one question before we object, relating to the telegram?

The Court: You may ask the question.

Q. By Mr. Champlin: Will you state whether or not the National Van Lines moved this particular shipment or was it the Von Der Ahe people acting in their official capacity?

A. Which shipment?

Mr. Champlin: The shipment in question, the O'Neil shipment as to which counsel inquired.

Mr. Wegener: I object to that, your Honor. I think that the bill of lading on this particular shipment, the Von Der Ahe people—

The Court: Please don't comment on the evidence. You [121] have been arguing the case throughout the trial. The objection will be overruled. It may be received in evidence.

The Clerk: Defendant's Exhibit A in evidence.

Q. By Mr. Wegener: Mr. Cusack, during that period of time, in 1946, and the early part of 1947, to the best of your knowledge were there any restrictions or enlargements on the rights of carriers under the Defense Transportation, to the best of your knowledge?

A. There was some diversion of traffic act in effect at that time.

(Testimony of Clem J. Cusack.)

Q. Was that, to your knowledge, the war enlargement, or the portion that had to do with transportation during the war period? A. Yes.

Q. Will you explain to the Court and jury, to the best of your knowledge, what this governmental function, to the best of your knowledge, was at that time in its relationship to you?

Mr. Champlin: I object again as irrelevant and immaterial and going outside of the scope of this case. It calls for a conclusion on the part of the witness on the matter of a government regulation.

The Court: Read the question.

(Question read by the reporter.)

The objection will be sustained. That calls for a [122] conclusion. He can give the facts.

Q. By Mr. Wegener: Will you give to the Court the facts as to the relationship between carriers during that period of time?

A. If carriers had shipments they could not handle themselves, they could divert to another carrier in the same territory.

The Court: It is testimony as to what the Government allowed.

The Witness: It is a matter of record, I believe.

The Court: That can be stricken. This witness cannot testify to that.

Q. By Mr. Wegener: In your conversations with the Von Der Ahe people did you at any time ask them how they were going to transport, or cause to be transported, any of the shipments?

A. No, sir.

(Testimony of Clem J. Cusack.)

Q. In other words, to the best of your knowledge, the shipments that were handled through an arrangement made by you two—that is true, as to the Von Der Ahe people personally?

A. Yes.

Q. In the performance or handling of the business which you secured, the Von Der Ahe people had full control and jurisdiction over it? [123]

A. Yes.

Q. The shipment of Mrs. O'Neil's, the \$50.00 which you received as a deposit, did you return that to Mrs. Johnston or Mrs. O'Neil in full after the Von Der Ahe people were unable to service this shipment?

A. Yes, Mrs. Johnston received the refund.

Q. Will you explain to the jury the transaction that resulted in the returning of this advance payment or prepayment?

A. According to the agent, due to weather conditions in Minnesota at that time, Von Der Ahe was unable to get a truck up there, so we had to cancel the order.

Q. Did this shipment drag out over a period of time that may have been unreasonably long so that the customer was incurring additional expense and so forth by virtue of her goods not being moved?

A. So she testified.

Mr. Champlin: Just a minute.

The Court: That is a conclusion.

By Mr. Wegener: Q. What were the facts which resulted in your returning the money? Give

(Testimony of Clem J. Cusack.)

the jury a complete story of it, other than weather conditions.

A. As I understood it, the person involved, Mrs. O'Neil of Minnesota, had to leave her home immediately up there, so she got a local company to call for her furniture. [124]

Q. How long was that period of time, between the time you made arrangements and her shipment was ready to move, and the shipment was canceled because you were unable to have it moved through the on Der Ahe people?

A. I would say about two weeks. I am not positive.

Q. You gave back the money in full to Mrs. O'Neil, or whatever party was handling the transaction?

A. To Mrs. Johnston.

Q. On or about October, 1946 did you enter into an agreement or arrangement with one Mrs. Francis Dambach, to move any household goods from Charleroi, Pennsylvania, to Los Angeles?

A. Yes, sir.

Q. Would you tell the Court who your arrangement was made with to have this shipment moved?

A. Von Der Ahe of St. Louis.

Q. Was this another of the transactions that was delayed, or that you gave the money deposited back, to the best of your knowledge, or was the shipment actually handled?

A. The shipment was handled by Von Der Ahe.

Q. The goods were picked up from Charleroi,

(Testimony of Clem J. Cusack.)

Pennsylvania by Von Der Ahe and brought to Los Angeles? A. Yes, Sir.

Q. The \$20.00 which you received from Mrs. Dambach, as her agent at this end of the line, was the amount of money [125] finally accounted for, to the best of your knowledge, by whoever handled the shipment?

A. Yes, it was deducted from the freight bill.

Q. On May 21, 1946, did you enter into any arrangement with Ethel Holman, to move household goods from Chicago, Illinois to Long Beach, California? A. Yes, sir.

Q. Did you receive a deposit check in prepayment in the amount of \$45.00? A. Yes, sir.

Q. To the best of your recollection, do you know what happened to that particular shipment?

A. I don't know what eventually happened. I know what my part would be.

Q. As to your part?

A. My part in this was that she wanted the furniture loaded in the next two or three days. I called Mr. Von Der Ahe, and I found that he could not load it in that length of time, and I returned the money to her.

Q. That was the \$45.00 you received as the deposit? A. Yes, sir.

Q. So far as you know the transaction died at that point?

A. I eliminated my self there. I don't know who handled it. [126]

Q. On July 12, 1946 did you enter into any arrangement with one William H. Koch, to transfer

(Testimony of Clem J. Cusack.)

his household goods from Covington, Kentucky to Los Angeles?

A. The arrangement was made with her, because her sister, I think her name was Rice,—Mrs. Koch was in Covington at the time.

Q. Mrs. Rice was on your end of the line?

A. Yes.

Q. Will you tell the Court and jury the facts concerning that particular transaction?

A. Mrs. Rice called us for an estimate. I went out and made the estimate and collected the deposit and sent the information to on Der Ahe. In the meantime Mrs. Rice's sister in Covington apparently contacted another moving company, that picked up the furniture. I collected the \$85.00 as a prepayment, and when the other company brought it in they wouldn't deliver it until they had the \$85.00. I refunded the \$85.00.

Q. You say to the best of your knowledge another moving company at the other end of the line was apparently given that business by someone else? Yes, sir.

Q. Do you know who that company may have been?

A. Richardson, I understand.

Q. In other words, the actual transaction of the [127] movement, when it was consummated, you had no part, through any agency arrangement or otherwise, to handle that shipment?

A. No, sir.

Q. Was that the reason why they demanded of you the \$85.00?

(Testimony of Clem J. Cusack.)

A. Yes, sir, because I had no agreement with Richardson whatsoever.

Q. Did you have any conversation with one Marvin Young, to move his goods from Cedar Rapids, Iowa to Gardena, California?

A. Mrs. Young; not Mr. Young.

Q. Did you receive a deposit from Mrs. Young at the time you made an estimate?

A. Yes.

Q. To the best of your knowledge and memory, do you recall the facts that surrounded that particular order?

A. Yes, I do. Mrs. Young called up for an estimate. I made an estimate and received a deposit and about two or three days later she called and said she could not receive her furniture at the time because her house was not ready for it. About three or four months later she called the office again and said they were ready now to receive the furniture I contacted Mr. Von Der Ahe's agent. At that particular time they did not have a van in Iowa, and it was very important for them that they get another company and I refunded the [128] \$50.00 to Mrs. Young.

Q. You refunded the full amount that you had received prior to that time? A. Yes.

Q. According to your testimony thus far, you have stated several shipments that were received from points in Pennsylvania, in Covington and Chicago, which came out to the State of California. To the best of your knowledge do you know why

(Testimony of Clem J. Cusack.)

such a condition would exist to delay the service?

Mr. Champlain: I object to that as calling for the conclusion of the witness, your Honor.

The Court: Yes. Objection sustained.

By Mr. Wegener: Q. In your conversation with on Der Ahe did he give you any reason for not being able to load the furniture on schedule?

Mr. Champlain: That would be hearsay, your Honor. I object to it.

The Court: Overruled.

A. The shipments were very small, to begin with, and unless the shipper was engaged to the full capacity of the van it wouldn't be good business to send the van up there for such a small quantity of furniture, in these out-of-the-way places.

Q. Were there any other ramifications to the shipments besides being small? [129]

A. Which particular ones?

Q. All of them you have mentioned up to this time, from Pennsylvania, Covington, and Chicago.

A. In Pennsylvania, there was no delay on that.

Q. Did the Von Der Ahe people express any reason to you for not being able to load them, other than the shipments being small?

A. They did not have a van in that territory.

Q. Were they exceptionally busy on westbound tonnage?

A. At that time very busy.

Q. Do you know what the situation was at that particular time relating to westbound tonnage?

(Testimony of Clem J. Cusack.)

A. The ratio was about one to ten; ten coming out, and one going in, with the other companies.

Q. By other companies you mean, to the best of your knowledge, other companies who serviced the shipments coming in here?

A. Yes, sir.

Q. Did you have any conversation with any other carrier during this particular time relating to the movement of their tonnage coming to the West Coast?

Mr. Champlin: I object to that as incompetent and immaterial in this case. Besides, it is hearsay.

The Court: Read the question.

(Question read by the reporter.) [130]

The Court: We are not interested with anyone, unless it is shown that some of the shipments were routed or he tried to route them through others.

Mr. Wegener: That is the point.

The Witness: Yes, in the ordinary course of business I contacted many traffic men.

By Mr. Wegener: Q. When you say traffic men do you mean representatives of other carriers?

A. Dispatchers of other carriers.

Q. To the best of your knowledge the situation as to the westbound tonnage was quite acute at that time?

A. Very acute.

Q. On or about September 4, 1946, did you talk to one Louis Nault about a shipment moving from Fremont, Nebraska, to Long Beach, California?

A. Yes, I did.

(Testimony of Clem J. Cusack.)

Q. Did you receive a deposit either from Mr. Nault or his agent or representative at the time?

A. From Mr. Nault.

Q. From Mr. Nault himself?

A. That's right.

Q. To the best of your memory do you know who actually loaded and delivered that particular shipment?

A. Von Der Ahe of St. Louis.

Q. Was that the result of any communication that you [131] had with Mr. Von Der Ahe?

A. Yes.

Q. Did you have any conversation with Mr. or Mrs. J. H. Oliver as to the movement from Los Angeles to San Antonio, Texas, or household goods?

A. I did.

Q. Did you receive a deposit of money from that shipment? A. Yes.

Q. Was that deposit of money credited to the shipper on the freight bill?

A. It was deducted from the freight bill.

Q. Who handled that particular shipment?

A. Von Der Ahe.

Q. Was the result of your conversation between you and the Von Der Ahe people in relation to this?

A. The result of our agreement.

Q. In your conversation with the Von Der Ahe people did the Von Der Ahe people at any time inform you as to the scope of their own individual operating authority? A. Yes.

(Testimony of Clem J. Cusack.)

Q. To the best of your knowledge do you remember what the scope of their authority was?

A. I believe they have the States east of Missouri, with the exception probably of Maine and Vermont.

Q. The States west of Missouri, so far as you knew, [132] they were operating through either their own, or arrangements with other carriers?

A. That is right.

Q. In all your transactions with these people who were interested in having shipments moved from one point to another, did you at any time have any idea that you might be bound by many laws relating to interstate commerce?

A. Certainly.

Q. To your knowledge did you know that you might be breaking some of those laws?

A. No, sir.

The Court: Just a moment.

Mr. Wegener: Strike that.

The Court: The objection will be sustained. The answer will be stricken. A man is supposed to know the law. The jury will disregard the answer. An objection was not made.

By Mr. Wegener: Q. Were you ever advised by any one of the company's agents that had jurisdiction over this type of movement to the effect that if you did certain things that you might be required to file for a brokerage certificate?

Mr. Champlin: I object to that. It is leading if nothing else.

(Testimony of Clem J. Cusack.)

The Court: It is not the duty of any government agency to inform anyone whether he is violating the law. If anyone wants to engage in business relating to interstate commerce, [133] he is supposed to know what is required. It is not material in this case.

Mr. Wegener: I was only—

The Court: I have ruled. Please proceed.

Mr. Wegener: That will be all.

The Court: Incidentally, ladies and gentlemen of the jury, I forgot to inform you that during the discussions with counsel and Court, the Court has dismissed Count II of the information. That was the count relating to Mrs. Hepner; so the only counts remaining before the jury are Counts I and Counts III to X inclusive. Proceed.

Cross Examination

By Mr. Champlin:

Q. Mr. Cusack, are you familiar with the tariff of the interstate carriers? I will show you the particular section pertaining to the Von Der Ahe people. You were asked on direct examination as to whether you knew what their scope of authority was for interstate transportation. I believe your answer was that they operated on the Eastern seaboard and certain points in the Middle West. Does that tariff relating to the on Der Ahe people state what your understanding of what their authority was?

A. Yes. I did not state a definite point. I said I believed they had everything west of Missouri.

(Testimony of Clem J. Cusack.)

Q. To your knowledge do they have any operation on the West Coast?

A. Not to my knowledge.

Q. Isn't it true that they are unable with their equipment to come into this territory? In all of these shipments, two in particular, didn't they move under the National Van Lines authority?

A. I believe they did.

Mr. Wegener: J object. The tariff speaks for itself.

The Court: Objection overruled. Your examination has taken a wide scope and I will allow the Government a wide scope.

By Mr. Champlin: Q. Did you say, Mr. Cusack, that you were familiar with this tariff?

A. Yes.

Q. Is this your understanding of their scope, this section that deals with the Von Der Ahe people's authority under the I.C.C.? Is that your understanding of their operation? A. Yes.

Mr. Champlin: I would like to have this marked as an exhibit for identification.

The Clerk: Government's Exhibit 14 for identification.

Mr. Champlin: The Government at this time offers in evidence page 54 of the participating carriers territorial [135] directory insofar as it pertains to the Von Der Ahe Moving Company. This is page 54, Section 3160.

The Clerk: It this admitted, your Honor?

The Court: It may be received.

(Testimony of Clem J. Cusack.)

The Clerk: 14 in evidence.

Q. Mr. Champlin: Mr. Cusack, in this transaction in which there was a delay as to which you did refund the money to the people, isn't it true that that was refunded after these people had contacted the Better Business Bureau, the I.C.C., the Sheriff's office, or some other Government agency?

Mr. Wegener: That is objected to, your Honor. The testimony is clear, and it would be irrelevant.

The Court: Objection overruled. He may be asked so long as the testimony goes to good faith.

A. I don't know what they did, sir. All I know is I refunded the money.

By Mr. Champlin: Q. Isn't it true that before such refund was made you were contacted by either the I.C.C., the Better Business Bureau, or some Government agency?

A. I couldn't say that is true, no, in every case.

Q. On this shipment to Paul Reese, Montana, do you recall the incident of the Belmont Company charging you \$38.00 for the storage of that particular shipment? A. Yes. [163]

Q. Then actually you received some \$11.00 that you were able to retain on it, is that correct?

A. Yes.

Q. In all of these transactions to which you testified on direct examination that you did receive the money, isn't it true that you gave the shipper a contract at the same time agreeing to certain terms relating to the shipment of the goods?

A. That's right.

(Testimony of Clem J. Cusack.)

Q. You signed the contract in each case, is that right? A. Yes.

Q. Isn't it true also that you have advertised in the local papers, the Los Angeles Times, the Los Angeles Examiner, and also the telephone directories?

A. That's right.

Q. And you are known as the Lincoln Transfer & Storage Company?

A. That's right.

Q. Do you have any trucks of your own, Mr. Cusack? A. No.

Q. You don't actually do any hauling then in interstate commerce whatsoever?

A. No, sir. I don't set myself up for that.

Q. Do you have any authority from the Interstate Commerce Commission to do any hauling?

A. I don't need it for my type of business.

Q. You don't have a broker's license?

A. I don't need it for what I do.

Q. You don't have a license or permit from the Interstate Commerce Commission as a motor carrier?

A. I don't need it for my business.

Q. In response to ads in the newspapers in these transactions, you have gone to people's homes and discussed the matter with them, is that correct?

A. Yes, sir.

Q. Have you represented to them that you would haul their shipments, such as the Pennsylvania shipment which was hauled on the Von Der Ahe

(Testimony of Clem J. Cusack.)

trucks to Los Angeles? Did you tell the shipper who would actually haul their equipment?

A. In that particular case I can't answer yes or no because I don't recall.

Q. Did you actually know at that time?

A. Certainly.

Q. You knew the Von Der Ahe people would haul it? A. Yes, sir.

Q. And the Minnesota shipment, did you know the Von Der Ahe people would haul that particular shipment? A. Yes.

Q. As a matter of fact there was some delay, and some other carrier transported to this area?

A. Yes, she gave it to some other carrier. Who I don't know. The delay was due to weather conditions.

Q. In the matter of the transportation of goods from Los Angeles to Washington, Seattle, Washington, by the North American Lines, you did not have any agreement with them to haul, did you, at the time?

A. I had an agreement with the Red Ball.

Q. Of your own knowledge, I believe you stated that the Red Ball, has no interstate authority, and can transact business in California alone; is that right? A. Yes.

Q. So far as you know the Red Ball was the agent for the North American?

A. That's right.

(Testimony of Clem J. Cusack.)

Q. Therefore you had no arrangement or agreement with North American, in the capacity of sub-agent, or anything to that effect?

A. No, sir.

Q. In the matter of the Montana shipment, between Los Angeles and Belgrade, Montana, that was hauled by the United Van Company, is that right?

A. That's right.

Q. You did not have any arrangement with them directly, did you at the time of the contract?

A. No. [139]

Q. Isn't it true that the Belmont Storage Company arranged that shipment up there?

A. That's right.

Q. With your knowledge, and you arranged to pay them certain storage fees, and also retained some money yourself, is that right? A. Yes.

Q. As a matter of fact, in all of these transactions you testified that the freight bill credited the shipper with the money that you received?

A. Yes, it was deducted from it.

Q. In each case, however, you got a commission back on each one of the shipments? A. Yes.

Q. Did you get a commission yourself?

A. Yes.

Q. You used that commission to pay telephone bills, office expenses and so forth? A. Yes.

Q. As a matter of fact you did have an office in Los Angeles? A. Yes.

Q. Is that in your home?

(Testimony of Clem J. Cusack.)

A. No, it is at 601 South Vermont.

Q. The telephone number is Drexel 5297? [140]

A. Yes.

Q. About what percentage did you receive? Is there a standing arrangement with the Von Der Ahe people that you would receive a certain percentage? A. That's right.

Q. What was the percentage you received?

A. Twenty.

Q. Is that 20 per cent of the complete freight cost or 20 per cent of the money you received at the time the contract was signed?

A. No, 20 per cent of the money received on the shipment.

Q. In other words, you kept \$20.00 on each \$100 of the complete freight cost?

A. That is right.

Mr. Champlin: That is all.

Mr. Wegener: The defendant rests his case.

The Court: Any rebuttal?

Mr. Champlin: No rebuttal, your Honor.

The Court: Ladies and gentlemen, we are about to take a recess until 1:30. You will be excused until 1:30. The Court admonishes you not to converse among yourselves or with anyone on any subject connected with the case or to form or express an opinion thereon until the case is finally submitted to you. You may withdraw from the court room. But [141] there is a matter I will take up with counsel.

Gentlemen, under the rule, the Court is required to inform counsel before the argument of the Court's action upon counsel's requested instructions. As I have observed on many occasions, the object of the law can only be to give counsel greater freedom in commenting upon the facts, because they are then in a position to know with greater freedom than existed before, what the Court's instructions in a general way would be.

Let the record show that the defendant has offered no instructions at all. The Government has offered some instructions, but Mr. Champlin, you haven't numbered those instructions, which makes it difficult to refer to them. However, I will state—you have a copy of the instructions, have you not?

Mr. Champlin: They are supposed to have them. I have one copy.

The Court: You had better hand it to counsel so he will know. First of all I will state that I give general instructions as to the quantum of proof, the meaning of reasonable doubt,—instructions which have been approved by the higher courts. I will number them here. The first one is "The Government is required to prove,"—have you got them in that order?

Mr. Champlin: Yes, your Honor. [142]

The Court: I am not giving 1 or 2 because they are covered by the other instruction.

I am giving 3, which is merely a statement that transportation is commerce.

I am giving 4 as a general statement of the charge.

I am not giving 5 because I have a better def-

from the famous case of *Murdock v. United States*, 292 U. S., which has been given for many years.

I am giving another which is the definition of a broker. I am not giving these in the order in which they appear. I am rearranging them so there will be continuity.

I am giving 7, which merely gives a portion of the Act. However, I am changing the end of it. It will read as follows, beginning with line 22: "you must find the defendant guilty as charged in such count of the information, as to which you find the facts to be true beyond a reasonable doubt." In other words, that is an omnibus instruction and I have modified it accordingly.

In addition to that, although the defendant has not offered any instructions, I am giving an instruction to this effect: The statute under which this prosecution was instituted also provides—then I read the proviso. That is the exception. Then I continue: "The defendant claims that he acted in the capacity of agent or [143] broker for a motor carrier, having a certificate of convenience and necessity. If you find that he did so act, or if the evidence raises a reasonable doubt as to whether he did so act, you must acquit the defendant."

I have also modified No. 7 on line 17, after "compensation." I have added the words "and without a broker's license." In other words, while I don't agree with your theory that it must be charged that way or that the Government must prove the exception, in instructing the jury I take into consideration the exception, because they must decide

from the entire evidence whether there was a violation, and if the man comes within the exception there is no violation.

I think, gentlemen, that has given you all the information about the instructions. The general instructions I have already outlined to you. I have made the instructions very simple, because as I see the issue, it is very simple.

How much time do you desire for argument?

Mr. Champlin: Twenty minutes, approximately that, or a half an hour.

Mr. Wegener: I would say that would be approximately it.

The Court: I will allow you a half an hour each, if you need that much time. That will mean that we can send the jury out a little after 2:30, which is ample time to give them an opportunity to dispose of the matter before the end of the day. [144]

Mr. Champlin: There is one request, your Honor. May we have the last clause of the defendant's instruction read again concerning being an agent?

The Court: I merely said this:—I merely changed each count and have given the instruction as follows: "you must find the defendant guilty as charged in such count of the information, as to which you find the facts to be true beyond a reasonable doubt." In other words, while it is true that the same law applies to all, nevertheless a jury are not required to be consistent. They might find the defendant guilty of one count and not guilty as to the others, and they should be given that opportunity.

Mr. Champlin: The Court misunderstood. I mean the instruction you will give for the defendant since he did not have a written copy.

The Court: I will read it in its entirety. You can have it transcribed if you want it. It will be the last instruction and reads:

“The statute under which this prosecution was instituted also provides:

‘That the provisions of this paragraph shall not apply to any carrier holding a certificate or a permit under the provisions of this chapter or to any bona fide employee or agent of such motor carrier, so far as concerns transportation to be furnished wholly by such [145] carrier, or jointly with other motor carriers holding like certificates or permits, or with a common carrier by railroad, express or water.’

“The defendant claims that he acted in the capacity of agent or broker for a carrier having a certificate of convenience and necessity.

“If you find that he did so act, or if the evidence raises a reasonable doubt as to whether he did so act, you must acquit the defendant.”

(Whereupon an adjournment was taken until 1:30 o'clock p.m. of the same day.) [146]

Los Angeles, California, Wednesday,

April 21, 1948, 1:30 p.m.

The Court: Let the record show that the jury is in the box and the defendant is in court with his counsel. Proceed.

(Arguments.)

The Court: Ladies and gentlemen of the jury, the Court will now give you instructions on the

law which are to govern you in your deliberations. All the instructions except the general instructions at the end, are in writing, and I shall read them as written with such modifications as may occur to me as I read them. If, after you begin your deliberations, you desire to have a copy of the instructions they will be sent to you if you express your desire to have them to the bailiff at the door.

You are also entitled to have the exhibits which may have been introduced in evidence by both sides, some portions of which have been read to you, and you may want to examine in detail the exhibits as you are deliberating on the case.

The law of the United States permits a judge to comment on the facts in the case. Such comments are mere matters of opinion which the jury may disregard if they conflict with their own conclusions upon the facts. This for the reason that the jurors are the sole and exclusive judges of the facts in each case. However it is not my custom to exercise this right nor shall I exercise it in the present case. I shall [147] leave the determination of the facts in the case to you, satisfied as I am that you are fully capable of determining them without my aid. However, it is the exclusive province of the Judge of this court to instruct you as to the law that is applicable to the case, in order that you may render a general verdict upon the facts in the case, as determined by you, and the law as given you by the Judge in these instructions. It would be a violation of your duty for you to attempt to determine the law or to base a verdict upon any other view of

the law than that given you by the court,—a wrong for which the parties would have no remedy, because it is conclusively presumed by the court and all higher tribunals that you have acted in accordance with these instructions as you have been sworn to do.

You are here for the purpose of trying the issues of fact that are presented by the allegations in the Information and the plea of the defendant thereto. This duty you should perform uninfluenced by pity for the defendant or by passion or prejudice on account of the nature of the charge against him. You are to be governed, therefore, solely by the evidence introduced in this trial, and the law as given you by the Court. The law will not permit jurors to be governed by mere sentiment, conjecture, sympathy, passion or prejudice, public opinion, or public feeling. Both the public and the defendant have a right to demand, and they do so demand and [148] expect, that you will carefully and dispassionately weigh and consider the evidence and the law of the case and give to each your conscientious judgment; and that you will reach a verdict that will be just to both sides, regardless of what the consequences may be. The offense with which the defendant is charged is: Entering into a contract to transport goods in interstate commerce without legal authority.

In this connection, you are instructed that the Information on file herein is a mere charge or accusation against the defendant, and is not any evidence of the defendant's guilt and no juror in this

case should permit himself to be, to any extent, influenced against the defendant because or on account of such indictment on file.

It is the duty of the jury to decide whether the defendant be guilty or not guilty of the offense charged considering all the evidence submitted to you in the case.

The jury are the sole and exclusive judges of the effect and value of the evidence addressed to them and of the credibility of the witnesses who have testified in the case, and the character of the witnesses as shown by the evidence, should be taken into consideration, for the purpose of determining their credibility and the fact as to whether they have spoken the truth. And the jury may scrutinize not only the manner of witnesses while on the stand, their relation to the case, if any, but also their degree of intelligence. A [149] witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testified, his interest in the case, if any, or his bias or prejudice, if any, against one or any of the parties, by the character of his testimony, or by evidence affecting his character for truth and honesty or integrity or by contradictory evidence; and the jury are the exclusive judges of his credibility.

A witness may also be impeached by evidence that he made, at other times, statements inconsistent with his present testimony as to any matter material to the cause on trial;

A witness false in one part of his or her testimony is to be distrusted in others; that is to say,

the jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; and the jury, being convinced that a witness has stated what was untrue, not as a result of a mistake or inadvertence, but wilfully and with the design to deceive, must treat all of his or her testimony with distrust and suspicion and reject all unless they shall be convinced that notwithstanding the base character of the witness, that he or she has in other particulars sworn to the truth.

The law does not require any defendant to prove his innocence, which, in many cases might be impossible. On the contrary, the law requires the Government to establish his guilt and that by legal evidence and beyond a reasonable [150] doubt.

If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case, find the defendant not guilty.

Reasonable doubt is not a mere possible doubt. Because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison, and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

While the defendant in a criminal action is not required to take the stand and testify, yet if he does so, his credibility and the value and effect of his evidence are to be weighed and determined by

the same rules as the credibility and effect and value of the evidence of any other witness is determined. And the tests for determining the credibility of witnesses as given you in another part of the instructions are to be applied to his testimony alike with that of other witnesses.

The defendant in each count of this information is charged with knowingly and wilfully for compensation selling and offering for sale transportation subject to the [151] Interstate Commerce Act, to-wit: transportation of property by motor vehicle in interstate commerce on public highways for compensation without a broker's license authorizing him to engage in such business.

The defendant is charged in each count of the information filed in this case, with the violation of Section 311(a) of Title 49 of the United States Code.

The Section provides:

“ (a) License Required: No person shall for compensation sell or offer for sale transportation subject to this chapter or shall make any contract agreement, or arrangement to provide, procure, furnish, or arrange for such transportation or shall hold himself or itself out by advertisement, solicitation, or otherwise as one who sells, provides, procures, contracts, or arranges for such transportation, unless such person holds a broker's license issued by the Commission to engage in such transactions: * * *”

Therefore, if you find from the evidence, beyond a reasonable doubt, that the defendant, Clem J.

Cusack, did knowingly and wilfully for compensation, and without a broker's license, sell, or offer for sale, transportation subject to the Interstate Commerce Act, or make any contract, agreement or arrangement to provide, procure, furnish or arrange for such transportation, or did hold himself out by advertisement, solicitation, or otherwise as one who sells, provides, procures, contracts, or arranges for such transportation, you must find the defendant guilty as charged in such count of the information as to which you find these facts to be true beyond a reasonable doubt.

Interstate Commerce subject to the Act so far as the law applies in this case is transportation by motor vehicle for compensation from one state to another state in the United States.

You are instructed that a broker is defined within the meaning of Section 311(a) Title 49, U. S. Code, as being any person, not a common or contract carrier, by motor vehicle, who or which as principal or agent sells or offers for sale any transportation subject to the Interstate Commerce Act, or who holds himself out by solicitation, advertisement or otherwise as one who sells, provides, furnishes, contracts or arranges, for such transportation.

You will note that under the information the acts are alleged to have been done knowingly, and wilfully. Doing or omitting to do a thing knowingly and wilfully implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it.

The word "wilfully" denotes an act which is intentional or knowing, or voluntary, as distinguished

from accidental. [153] When used in a criminal statute, it generally means an act done with a bad purpose. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act.

When the defendant seeks to disprove the allegations of an indictment or information a different rule applies than when the Government endeavors to prove them.

A defendant is not required to prove a fact beyond a reasonable doubt nor by a preponderance of the evidence. It is enough if the evidence he produces is sufficient to create in the minds of the jurors a reasonable doubt with respect to any of the facts essential to constitute the offense.

The statute under which this prosecution was instituted also provides:

“That the provisions of this paragraph shall not apply to any carrier holding a certificate or a permit under the provisions of this chapter or to any bona fide employee or agent of such motor carrier, so far as concerns transportation to be furnished wholly by such carrier, or jointly with other motor carriers holding like certificates or permits, or with a common carrier by railroad, express or water.”

The defendant claims that he acted in the capacity of agent or broker for a motor carrier having a certificate of convenience and necessity to engage in the particular transaction wholly or jointly with

other motor carriers holding like certificates or permits.

If you find that he did so act, or if the evidence raises a reasonable doubt as to whether or not he did so act, you must acquit the defendant. [155]

Your first duty on retiring to the jury room to begin your deliberations in this case will be to select one of you, man or woman, to act as foreman of the jury.

As I have already told you, the jury in a Federal Court is what is known as a common law jury; that is, it requires that in order to arrive at a verdict, both in civil and criminal cases, it must be unanimous. In that respect it differs from the State law, at least in a civil case, where nine may reach a verdict. Of course, this is a criminal case, so even if it were governed by the State law it would still require a unanimous verdict. That is, all twelve jurors must agree upon the verdict.

For your assistance the clerk has prepared a form of verdict entitled, Court and cause, No. 19898. Criminal. Verdict.

We, the jury in the above entitled cause find the defendant Clem J. Cusack (blank) as charged in Count 1 of the information; (blank) as charged in Count 3; (blank) as charged in Count 4; (blank) as charged in Count 5 of the information; (blank) as charged in Count 6 of the information; (blank) as charged in Count 7 of the information; (blank) as charged in Count 8 of the information; (blank) as charged in Count 9 of the information; (blank)

as charged in Count 10 of the information. Dated April (blank) 1948.

(Blank) Foreman of the jury. [156]

As you have already been informed, the information originally contained 10 counts, but Count 2 has been dismissed, so there are only left 9 counts, being 1 and 3 to 10, inclusive.

If you find the defendant guilty as to Count 1 of the information, you will put the word "Guilty" in the blank space opposite that count. If you find him "Not Guilty," you will put those words there. If you find him guilty of the Count 3, you will put the word "Guilty" in the blank space opposite that count. If you find him "Not Guilty," you will put in those words and so on down the line to 4, 5, 6, 7, 8, 9 and 10. If you find the defendant guilty as to any of those counts, you will insert the word "Guilty" in the proper place. If you find him not guilty, you will insert the words "Not Guilty" in each count where you so find.

While you are required to return a verdict as to all the counts unless the Court should permit you, as the Court may at times, to return a verdict as to some of the counts only, your verdict need not be the same. In other words, you may find the defendant guilty as to one count and not guilty as to another. It is up to you to determine as to each count whether the evidence as to the particular count proves him guilty. If it does not, then you must acquit him. That applies, of course, to the entire case.

Before you can return a verdict as to any count you must [157] find beyond a reasonable doubt that

the evidence proves him to be guilty at the time charged in that particular count. The verdict must then be dated and signed by your foreman. After it has been properly filled out and signed by the foreman, you will return into court.

Are there any objections to the instructions given or the instructions refused? If so, an opportunity will be granted to counsel for either side to present your objections outside of the hearing of the jury.

Mr. Champlin: If the Court please, there is only one point on that last instruction. I might raise one clarification point. There is no objection generally.

(The following proceedings were had at the bench between Court and counsel, without the hearing of the jury:)

Mr. Champlin: There is a clarification on the point of being an agent for some company having an interstate permit. We would like to have it clarified as to this territory. If you find that he was the agent for a company having a permit in some other district, it would not apply.

(Discussion.)

The Court: Ladies and gentlemen of the jury, the object of the law in allowing counsel to make objections to instructions is demonstrated by what occurred in this case. Counsel has called my attention to the last instruction, which they feel should be amplified a little, and after discussing the [158] matter a little further I have decided to clarify it both in respect to the way they suggest and then I will add a clarification of my own. So that you will understand why, when the defendant presents a

defense there is a different rule which applies than the rule which obtains in the Government's case. So instead of the last instruction beginning "The statute under which this prosecution was instituted also provides" I will give the following instruction which will include that also:

When the defendant seeks to disprove the allegations of an indictment or information, a different rule applies than when the Government endeavors to prove it, and the defendant is not required to prove the fact beyond a reasonable doubt, nor by a preponderance of evidence. It is enough if the evidence he produces is sufficient to create in the minds of the jurors a reasonable doubt with respect to any of the facts essential to constitute the offense.

The statute under which this prosecution was instituted also provides.

No such person shall engage in transportation subject to this chapter unless he holds a certificate or permit as provided in this chapter. In the execution of any contract, agreement, or arrangement to sell, provide, procure, furnish, or arrange for such transportation, it shall be unlawful for such person to employ any carrier by motor vehicle who or [159] which is not the lawful holder of an effective certificate or permit issued as provided in this chapter:

And provided further, That the provisions of this chapter shall not apply to any carrier holding a certificate or a permit under the provisions of this chapter or to any bona fide employee or agent of such motor carrier, so far as concerns transporta-

tion to be furnished wholly by such carrier or jointly with other motor carriers holding like certificates or permits, or with a common carrier by railroad, express, or water.

The defendant claims that he acted in the capacity of an agent or broker for a motor carrier having a certificate of convenience and necessity to engage in a particular transaction, wholly or jointly with other motor carriers holding like certificates or permits. If you find that he did so act, or the evidence discloses beyond a reasonable doubt as to whether or not he did so act, you must acquit the defendant.

In all other respects the instructions stand as previously given. Any other objections to the instructions?

Mr. Champlin: No objections, your Honor.

Mr. Wegener: No objections, your Honor.

The Court: The clerk will now swear the bailiff. You will now follow the bailiff and begin your deliberations in the case. I hand to the bailiff the blank form of verdict.

(The jury retired at 3:12 p.m.) [160]

The Court: We will stand a recess until we hear from the jury.

(Jury returned at 4:00 o'clock p.m.)

The Court: Let the record show that the jury has returned, and the defendant is in court with his counsel.

Ladies and gentlemen, have you arrived at a verdict?

The Foreman: We have.

The Court: Hand the verdict to the bailiff, and then to the clerk and the Court. The clerk will read the verdict.

The Clerk: (Reading)

“United States District Court, Southern District
of California, Central Division

No. 19,898 Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLEM J. CUSACK,

Defendant.

VERDICT

We, the Jury in the above-entitled cause, find the defendant, Clem J. Cusack,

Guilty as charged in Count 1 of the Information;

Guilty as charged in Count 3 of the Information;

Guilty as charged in Count 4 of the Information;

Guilty as charged in Count 5 of the Information;

Guilty as charged in Count 6 of the Information;

Guilty as charged in Count 7 of the Information;

Guilty as charged in Count 8 of the Information;

Guilty as charged in Count 9 of the Information;

Guilty as charged in Count 10 of the Information;

Dated: Aril 21, 1948.

MABEL S. QUARY,

Foreman of the Jury.

The Court: The clerk will enter and record the verdict.

Do you desire the jury polled?

Mr. Wegener: No, your Honor.

Mr. Champlin: We are satisfied.

The Court: You don't desire the jury polled?

Mr. Wegener: No.

* * *

The Court: I will be glad to hear from the defendant. The defendant does not impress me as being a man who has been in trouble before. Let us continue it until tomorrow morning at 10:00 o'clock and I will impose sentence at that time. I will order that the matter be not referred to the Probation Officer.

(The matter was here continued until tomorrow morning, April 22nd, 1948, at 10:00 o'clock a.m. and the defendant allowed to remain at liberty on bond.) [162]

Los Angeles, California, Thursday, April 22, 1948,
10:00 A.M.

The Clerk: 19898 Criminal. United States of America vs. Clem J. Cusack.

The Court: This report was just presented to me. I will read it. Have counsel seen the report?

Mr. Champlin: Yes.

Mr. Wegener: Yes.

The Court: This may be filed. I will hear anything further you desire to say.

Mr. Champlin: The Government has nothing more to say, your Honor.

The Court: I will hear Mr. Wegener.

* * *

Mr. Wegener: I would like to ask if a motion for arrest of judgment can be made in the proceedings.

The Court: There is no provision in the rule.

Mr. Wagener: Under Rule 34.

The Court: No oral motions can be made. There is no provision for an oral motion but if you desire to make a motion at the present time I will entertain it, and the minute order will show that you did so. If you will state your grounds.

Mr. Wegener: At this time I would like to make a motion to set aside the verdict: First, upon the ground that the evidence in the case does not support the judgment for a [163] violation of the brokerage section of the Code. And a like motion on the grounds that prejudicial statements were made in open court to the effect that only the mere holding out of a person to sell transportation service subject to the Act constituted a violation of the brokerage section of the Code. And on the further ground that statements were made to the effect that—

The Court: Are you referring to statements made by the Court or statements made by the counsel for the Government?

Mr. Wegener: Both, your Honor.

The Court: You took no exception to the instructions and any statement I made. I stated to

the jury that I would instruct them as to the law, and you cannot assign error on the part of the Court in any discussion with counsel without calling the Court's attention to it, but even then I warned the jury that what I was saying was not to be taken as an instruction on the law.

Mr. Wegener: As I recollect, the thing before the Court was to the effect that the negative parts of the exception of the statute is not pleaded in the bill or information, and they could be proved in court and there was no evidence to support the negation of the statute.

The Court: That goes to the sufficiency of the evidence, but I am talking about the statements supposed to have been made, stating in substance what you said now. I want to find [164] out if you are referring to anything the Court said during the course of the argument on the instructions or anything that counsel for the Government said.

Mr. Wegener: There is a statement also made in the argument of counsel for the plaintiff to the jury to the effect that the brokerage bond is to indemnify the public against such actions as these.

The Court: The answer is twofold. In the first place, whenever you object to the statement of counsel for the government it is your duty under the law, and it is the practice even without rules of court, to call the attention of the Court to it so the Court can admonish the jury, if the Court thinks your objection is well taken, and to admonish counsel not to repeat it. So far as I remember you took no exception whatever to his remarks. Furthermore,

if you do not you cannot complain. He has a right to argue the facts as he sees them. The jury were warned that the arguments of counsel are not evidence and that the only law they are to follow is that given by the Court in its instructions. So in the absence of that, I can't see that anything was said by counsel that could be considered error or anything said by me in the course of the trial, and in the ruling on the evidence I gave my reasons and warned the jury that anything I said should not be considered by them as an instruction.

Mr. Wegener: The way I understood the Court's interpretation of the statute was that the Court's instruction of the wording was to the effect, and I am sure the impression of the jury was to the effect that in the limitation of the statute itself was that the defendant was holding himself out as a broker.

The Court: There is no such statement in the record and certainly not in my instructions. In fact, I said to you while we were discussing the instructions to be given, that while I did not agree with you that the exception must be pleaded, that I would instruct the jury that the exception constituted a complete defense, and I did so instruct them. You are bunching the general instructions which the Court gave to any ruling he may have made on your motions and you can't do that. You have got to separate the two and indicate wherein a ruling that I made during the course of the trial was erroneous, because any statement I made in a ruling on evidence is not an instruction, and the

jury was so warned, and in my charge to the jury even though you did not present me with any instructions, I gave the instruction which stated that if a reasonable doubt arises in your minds as to whether or not he was such agent he was entitled to an acquittal. Then when my attention was called by the Government to what he thought was an obscurity that should be clarified, I clarified it in a manner agreeable to both of you. In addition to that I gave a special instruction so the jury would have before [166] them clearly the proposition that when the defendant presents the rule of proof beyond a reasonable doubt, even a preponderance of evidence does not apply. All he has to show is sufficient evidence from which a reasonable doubt may arise, and if such doubt arises he is entitled to it. So the only defense you had was fully and adequately presented before the jury even without any suggestion on your part, because if the Government had not raised that point, that instruction I gave of my own instance, which I wrote myself, would have been the only way by which your defense was presented to the jury. It was not my duty to do so. That is why you are required to offer suggestions and that is why I am required before the argument to inform you as to my action on the instructions, and that is why, in addition to that, you have objections to instructions given or refused. Rule 30 says:

“At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file written requests that the Court instruct the jury on the law as set forth in

the requests. At the same time, such requests shall be furnished to the adverse parties. The Court shall inform counsel of his proposed action upon the requests prior to the argument to the jury, but the Court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection."

There was no objection on your part whatsoever, and the only suggestion we had, which was outside of the hearing of the jury, was as to the Government's suggested clarification of one of the instructions, to which I agreed and which I modified in the manner I have already indicated. That is the law which governs. Nothing that I said in ruling upon any motion directed to the evidence could possibly be misconstrued by the jury, because they were instructed specifically that any discussion between you and me was to be disregarded as not being an instruction as to the law, but merely an answer to counsel's argument.

Mr. Wegener: Thank you, your Honor, I appreciate that and it has clarified some points for me which I had been trying to figure out.

I would like to make a motion at this time, your Honor, to arrest the judgment, based on Rule 34, that the information as set up by the Government did not charge an offense against the defendant and no evidence was offered by the plaintiff to prove

that the defendant was not within the exceptions of the Code.

The Court: Is there anything you want to add, Mr. Champlin? [168]

Mr. Champlin: No, your Honor, there is nothing more at this time.

The Court: Both motions will be denied and I order that in any transcript to be prepared in this case there shall be included, both in the official typewritten transcript and in the portion of the transcript which is printed, the remarks I have just made as to the various points, so that I will not try to repeat them. But I repeat for the record this fact: At no time during the course of the trial was any exception taken to any remarks made by the court in answer to counsel's objections, or any remarks made by counsel for the Government. However, the Court on its own motion, as the record will show, cautioned the jury that any statements made by the Court in answer to counsel's objection to the introduction of certain evidence, should not be taken as rulings on the law, or as an expression of opinion on the facts. In the instructions the Court gave its usual instructions which stated that the Court has no opinion as to any of the facts in the case and if from anything that occurred they think the Court has an opinion, they have the right to disregard it.

The second point, that the Government failed to prove that the defendant was within the exception, was made the basis of a motion to acquit at the close of the Government's case. It was denied upon the

ground stated at the time, and the Court here incorporates as a part of those remarks, that [169] the Court made while the argument on the motion for an acquittal was made, stating why in the Court's opinion the exceptions under 311(a) Title 49 need not be pleaded or proved as a part of the Government's case, and while there was a distinction between the exception provided in 306 and the exception provided in 311, in that Section 306 only concerned carriers engaged in business at a certain time and were made subject to the Act, even when that was the case the Government must show that the carrier was only engaged at the time the law applied, while in 311 there is no date limit. However, the motion might have been well taken at the time, but it is not well taken now because the defendant has taken the stand and when the defendant takes the stand and gives his version of the transaction, and by claiming agency, he presents his question of agency as a question of fact and he is not in a position to claim that he was within the exception.

In addition to that attention is called to the fact that counsel for the defendant did not present to the Court any instructions on behalf of the defendant, but, notwithstanding this, the Court gave a very elaborate instruction to the jury setting forth the exception under 311 and stating to the jury that if the evidence before them showed that the defendant was within the exception, or it even raised a reasonable doubt as to whether he was, he was en-

titled to an acquittal. [170] That when the Government sought to clarify the instructions given, the Court reworded the language suitable to both and elaborated further on the quantum of proof.

At the conclusion of that the Court asked again of counsel if they had any further objections and counsel for both sides said that they had none.

I am making this statement for the record at this time so it will appear in one place rather than be scattered throughout the record.

For these reasons the motions just made, and each of them, will be denied.

For the record I will repeat: Have you anything further to say in regard to the sentence, or any information in addition to that which was supplied me in this report by Mr. Shoup, Special Agent for the Interstate Commerce Commission?

Mr. Champlin: The Government has nothing further in the way of information to offer the Court.

The Court: Now I will hear from the defendant's counsel as to anything further he wants to say.

* * *

The Court: Is there any legal cause to show why judgment should not be pronounced at this time? (To the defendant) Will you please arise?

I think the evidence in this case shows not only a wilful, if any distinction can be made in wilfulness, but [171] a deliberate setting out to violate the law and leading people to believe that the defendant was what he was not. I think it is quite evident

from this advertisement and also from the bill of lading. In the advertisement the defendant is not holding himself out as agent for anyone else. This advertisement which is Plaintiff's Exhibit 8 reads:

“Long distance moving to and from everywhere.

“Daily bookings to all principal cities. Our return load system saves you \$\$.

“Door to door service.

“No crating necessary. Don't move before checking our rates.

“Lincoln Storage & Transfer Co.

“Agent 601 South Vermont Avenue.

“24-hour telephone service. Drexel 5297.”

This constitutes one-quarter of a classified ad in the classified directory, and I trust that a photostatic copy of this go up with the appeal, so the court will see the difference in type, which is in big black faced type in the title, Long distance moving. And in very small letters the word “Agent,” but not for whom. In other words, a person reading this could look at the entire page and not see the word “Agent.” If he did he wouldn't be any wiser. He is led to believe, as the defendant himself testified, that he was engaged in the business of transportation himself, not [172] soliciting for others. That is borne out by the bill of lading.

The bill of lading has a blank space for the name, as illustrated by Exhibit 1. The title of it is “Lincoln Transfer Co.” Shipper's copy. That is at the top. And at the bottom it says “Carrier: Von Der Ahe. C. J. Cusack,” but the others, 11 and 2 and 3, contain the name of the Lincoln Transfer at the top

and at the bottom it says "Lincoln. C. J. Cusack." And they have scratched out the word "Carrier" and left the word "Agent."

The evidence clearly shows that at no time were these persons informed that he was merely an agent soliciting for others, and that the services were rendered by someone else. The only real invoices, which may be called such, would indicate the agency on this perhaps by the United Van Lines, such as Exhibit 13, which contains the actual charges, and which were rendered after the transportation had been effected.

No. 7, which is entitled "Order for Services," like the others, except the last one I have mentioned, has the word "Lincoln" and "C. J. Cusack," and the word "Agent" printed on the side, but no other indication. So I feel that there is not only such wilfulness as may be inferred from the facts, but a deliberate attempt to make the shippers believe that the defendant was actually engaged in the transportation and solicitation of trade without a license. [173]

No legal cause being shown, it is the judgment of the Court that for the offense of which you stand convicted on Count I of the information that you be fined the sum of \$100;

For the offense of which you stand convicted on Count III for the information that you be fined the sum of \$100;

It is the judgment of the Court that for the offense of which you stand convicted on Count IV

of the Information that you be fined the sum of \$100;

That for the offense of which you stand convicted on Count V of the Information that you be fined the sum of \$100;

It is the judgment of the Court that for the offense of which you stand convicted on Count VI of the Information you be fined the sum of \$100;

It is the judgment of the Court that for the offense of which you stand convicted on Count VII of the Information you be fined the sum of \$100;

It is the judgment of the Court that on Count VIII of the Information, for which you stand convicted, that you be fined the sum of \$100;

It is the judgment of the Court that for the offense of which you stand convicted on Count IX of the Information that you be fined the sum of \$100;

It is the judgment of the Court that for the offense of which you stand convicted on Count X of the Information you [174] be fined the sum of \$100.

I understand that there is no prior conviction of this defendant.

Mr. Champlin: That is correct. We have no information of any prior violation.

The Court: There have been no prior violations so far as the record shows:

Mr. Champlin: That is correct.

The Court: Section 322 says: "Any person knowingly and wilfully violating any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not herein provided, shall, upon conviction thereof,

be fined not more than \$100 for the first offense and not more than \$500 for any subsequent offense.”

It is therefore the judgment of the Court that the fine be as stated, and that the total fine be the sum of \$900.

I may say for your benefit that in all these cases where wilfulness appears, I have imposed the maximum fine. Sometimes, when there are mitigating circumstances I have allowed some of them to run concurrently. One of which there were 30 violations I allowed to run concurrently. But in this case I don't think I would be justified in doing that. I think the maximum should be imposed because of the wilfulness of the violation. [175]

The defendant will stand committed in lieu thereof if the fine is not paid.

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 9th day of August A.D., 1948.

/s/ HENRY A. DEWING,
Official Reporter.

[Endorsed]: Filed Sept. 28, 1948.

[Endorsed]: No. 11922. United States Court of Appeals for the Ninth Circuit. Clem J. Cusack, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed September 28, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.